Supreme Court, U.S.
FILED

No. 991490 MAR - 7 2000

OFFICE OF THE CLERK

In The

Supreme Court of the United States

STATE OF SOUTH DAKOTA; WILLIAM JANKLOW, Governor of South Dakota; MARK W. BARNETT, Attorney General of South Dakota; SCOTT PODHRADSKY, State's Attorney of Charles Mix County; HERMAN PETERS, Member of the Charles Mix, South Dakota, County Commission; BRUCE BAKKEN, Member of the Charles Mix, South Dakota, County Commission; JACK SOULEK, Member of the Charles Mix, South Dakota, County Commission; SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Petitioners,

v.

YANKTON SIOUX TRIBE, and its individual members; UNITED STATES OF AMERICA, on its own behalf and for the benefit of the Yankton Sioux Tribe; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

MARK W. BARNETT
Attorney General
State of South Dakota

JOHN PATRICK GUHIN
Deputy Attorney General
Counsel of Record
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

21 pp

QUESTION PRESENTED

WHETHER AN 1894 STATUTE RATIFYING AN AGREEMENT BETWEEN THE YANKTON SIOUX TRIBE AND THE UNITED STATES DISESTABLISHED THE YANKTON SIOUX RESERVATION (AS THE SOUTH DAKOTA SUPREME COURT HELD) OR WHETHER THE RESERVATION STILL EXISTS, CONSISTING OF MORE THAN 1,000 ACRES OF CEDED LANDS, CONTRARY TO THE PRECISE HOLDING OF THIS COURT IN *SOUTH DAKOTA V. YANKTON SIOUX TRIBE*, PLUS POTENTIALLY THOUSANDS OF OTHER SCATTERED AND NONCONTIGUOUS ACRES (AS THE EIGHTH CIRCUIT HELD).

PARTIES

Pursuant to the rules of this Court, *see* Supreme Court Rule 12.4, the caption to the Petition identifies as Petitioners each of the parties aggrieved in the four cases consolidated in the Eighth Circuit and identifies as Respondents the opposing parties in these cases. *See also* Stern and Gressman, *Supreme Court Practice* § 6.18 (7th ed. 1993). Scott Podhradsky has been substituted as the present State's Attorney of Charles Mix County.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING CERTIORARI 11

I. THE DECISION OF THE EIGHTH CIRCUIT SQUARELY CONFLICTS WITH THE SUBSEQUENT DECISION OF THE UNANIMOUS SOUTH DAKOTA SUPREME COURT 11

II. THE DECISION OF THE EIGHTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT AND ESTABLISHED INDIAN LAW JURISPRUDENCE 14

III. THE ISSUES RAISED BY THIS CASE ARE IMPORTANT AND RECURRING 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES CITED

Alaska v. Native Village of Venetie, 522 U.S. 520 (1998) 22, 24

Braxton v. United States, 500 U.S. 344 (1991) 13

Bruguier v. Class, 599 N.W.2d 364 (S.D. 1999) 11, 13

DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... *passim*

Hagen v. Utah, 510 U.S. 399 (1994) 14

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) 26

Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993) 26

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 27

Solem v. Bartlett, 465 U.S. 463 (1984) 22, 27

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) ..... *passim*

State v. Greger, 559 N.W.2d 854 (S.D. 1997) 5

Strate v. A-1 Contractors, 520 U.S. 438 (1997) 26

United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), *cert. denied*, 430 U.S. 980 (1977) 27

United States v. Pelican, 232 U.S. 442 (1914) 24

United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999) 25

United States v. Stands, 105 F.3d 1565 (8th Cir. 1997), *cert. denied*, 522 U.S. 841 (1998) 25

TABLE OF AUTHORITIES – Continued

Page

Williams v. Lee, 358 U.S. 217 (1959) 26

Yankton Sioux Tribe v. Gaffey, 890 F.Supp. 878 (D.S.D. 1995) 6

STATUTORY REFERENCES

11 Stat. 743 (1859) 1

24 Stat. 388 (1887) 4

26 Stat. 795 (1891) 4

26 Stat. 1035 (1891) 15, 16, 17

27 Stat. 120 (1892) 4

28 Stat. 286 (1894) 2, 17

33 Stat. 254 (1904) 27

36 Stat. 440 (1910) 28

36 Stat. 448 (1910) 27

39 Stat. 969 (1917) 27

45 Stat. 1167 (1929) 21

18 U.S.C. § 1151 24

18 U.S.C. § 1151(a) 10

18 U.S.C. § 1151(c) 22, 24

25 U.S.C. § 331 4

25 U.S.C. § 467 25

28 U.S.C. § 1254(1) 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

S. Exec. Doc. No. 27, 53d Cong., 2d Sess. (1894) 4

S. Misc. Doc. No. 134, 53d Cong., 2d Sess., 1 (1894) 19

Stern and Gressman, *Supreme Court Practice* § 6.18 (7th ed. 1993) ii

Supreme Court Rule 12.4 ii

Wrend and Smith, *American Indian Law Deskbook* (2d ed. 1998) 26, 27

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on August 31, 1999, insofar as the judgment and opinion find that the Yankton Sioux Reservation has not been disestablished.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 188 F.3d 1010 (8th Cir. 1999) and is reprinted in the Appendix (App.) at 1-49. The Memorandum Opinion and Order of the United States District Court for the District of South Dakota are reported at 14 F.Supp.2d 1135 and are reprinted at App. 50-113.

JURISDICTIONAL STATEMENT

The judgment of the Eighth Circuit was entered on August 31, 1999. The Eighth Circuit denied timely petitions for rehearing and suggestions for rehearing en banc on December 8, 1999. App. 114. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Treaty with the Yankton Sioux, 1858, ratified, 11 Stat. 743 (1859) is reprinted in the Appendix at 115-126.

The Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286, 314 (1894) is reprinted in the Appendix at 127-140.

INTRODUCTION

Three years ago, this Court granted certiorari to resolve a conflict between the South Dakota Supreme Court and the Eighth Circuit as to whether an 1894 statute that ratified an agreement between the Yankton Sioux Tribe and the United States diminished the boundaries of the Yankton Sioux Reservation. After briefing and argument, the Court concluded that the "cession" and "sum certain" language in the statute manifested an unmistakable intent to diminish the reservation. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344-45 (1998). The Court accordingly held that the lands ceded in the statute "were severed from the reservation," *id.* at 358, and that the Act was "readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries." *Id.* at 345. The Court expressly left open, however, the question "whether Congress disestablished the reservation altogether." *Id.* at 358. Within one day of each other in the late summer of 1999, the South Dakota Supreme Court and the Eighth Circuit issued opinions on that very issue, and once again reached conflicting results. This petition asks the Court to resolve the conflict.[1]

[1] As used herein, the term "JA" refers to the Joint Appendix filed in the Eighth Circuit in the present litigation. The term "1995 Transcript" refers to the transcript of the original trial of

As in *Yankton Sioux Tribe*, 522 U.S. 329, the answer to the question presented will determine whether South Dakota has primary jurisdiction over activities occurring on the affected acreage within the state, or whether the Tribe and the federal government have primary jurisdiction. As long as the conflict among the courts persists, residents of the state and the competing sovereigns will not know whose laws and regulations govern. Review by this Court is needed to end this untenable situation.[2]

STATEMENT OF THE CASE

A. History of the Reservation.

This case once again brings to this Court's attention the facts related to the creation and cession of the Yankton Reservation. *See Yankton Sioux Tribe*, 522 U.S. at 333-40. In 1858, the United States entered into a treaty with the Yankton Sioux Tribe in which the Tribe "cede[d] and relinquish[ed]" substantial lands (App. 116) in exchange for the United States' "pledge[ ] to protect the Yankton Tribe in their 'quiet and peaceable possession' of this reservation," *Yankton Sioux Tribe*, 522 U.S. at 334, which was later surveyed and determined to encompass 430,405 acres. *Id.* at 334. Subsequently, under "pressure from westward-bound homesteaders, and the belief that

---

this matter on April 3-7, 1995. The term "1998 Transcript" refers to the hearing after remand held on May 20, 1998.

[2] Petitioners have requested simply that certiorari be granted but, given the error below, summary disposition may also be appropriate.

the Indians would benefit from private property ownership," *id.* at 335, Congress passed the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331 (commonly known as "the Dawes Act"). Pursuant to that Act, "each member of the Yankton Tribe received a 160-acre tract from the existing reservation, held in trust by the United States for 25 years." *Yankton Sioux Tribe*, 522 U.S. at 336. The allotment proceeded quickly. By 1890, 167,325 acres had been allotted under the Dawes Act; 95,000 additional acres were subsequently allotted under the Act of February 28, 1891, 26 Stat. 795. *Yankton Sioux Tribe*, 522 U.S. at 336. This left a surplus of approximately 168,000 acres of unallotted lands. In 1892, Congress enacted 27 Stat. 120, 137 (1892), which authorized funds "[t]o enable the Secretary of the Interior in his discretion to negotiate with any Indians for the surrender of portions of their respective reservations. . . . " In the same year, the United States appointed the Yankton Indian Commission. S. Exec. Doc. No. 27, 53d Cong., 2d Sess. (1894). Negotiations followed during which the parties equated the pending agreement with a contemporaneous Lake Traverse cession, *see* S. Exec. Doc. No. 27, 53d Cong., 2d Sess. at 54, 68, 71, which had resulted in disestablishment of that reservation. *See DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975).

The agreement reached between the tribal members and the United States provided, in Article I, that the Tribe would "cede, sell, relinquish, and convey to the United States" all of its unallotted lands. App. 128; *Yankton Sioux Tribe*, 522 U.S. at 338. In Article II, the United States agreed to pay the Tribe $600,000, or $3.60 an acre. App. 129; *Yankton Sioux Tribe*, 522 U.S. at 338. As a result of the 1894 Act, the Tribe retained no land for itself. *See* App. 31,

95-96; 1998 Transcript 45-46; 1894 Agreement, Article I, App. 128-129 ("all the unallotted lands" ceded). Tribal members disposed of most of their allotments in a fairly short period of time. By 1930, the Yankton Indians owned only 43,358 acres. *State v. Greger*, 559 N.W.2d 854, 867 (S.D. 1997). By the time of trial, at least 85 percent or 222,000 of the original 262,000 acres of allotted land had been transferred in fee to non-Indians. *See Yankton Sioux Tribe*, 522 U.S. at 339; *see also* Ex. 168, JA 414 (map).

Among the lands "ceded" to the United States for payment in 1894 were lands described in Article VIII as occupied by the United States for "agency, schools, and other purposes," App. 132 (commonly known as the "agency" lands); Article VIII reserved the ceded agency lands from sale to settlers and held them in the name of the United States "until they are no longer required for such purposes." In 1929, Congress provided that the agency lands could be transferred to the Tribe, but only "when they are no longer required for agency, schools, or other purposes." Act of February 13, 1929, 45 Stat. 1167. In a 1934 opinion, the Solicitor of the Department of the Interior held that the United States had "permanently discontinued" the use of the lands and that they were "no longer needed for any of such purposes." Ex. 627, JA 572. He therefore held that the lands, which were thought to constitute approximately one thousand acres, belonged to the Yankton Sioux Tribe. *Id.*[3]

---

[3] *See* note 8, *infra*, as to the actual date of transfer.

B. The First Round of Litigation.

The dispute over the status of the reservation was commenced by the Yankton Sioux Tribe after several South Dakota counties formed the Southern Missouri Recycling and Waste Management District for the purpose of constructing a municipal solid waste facility. The site acquired by the Waste District for a landfill was on land ceded in the 1894 Act. Believing that state regulations governed that land, the Waste District sought a state permit for the landfill. After state courts rejected environmental challenges to the permit, the Yankton Tribe filed suit in the United States District Court for the District of South Dakota seeking to enjoin construction of the landfill. The Waste District joined South Dakota as a third-party so that the state could defend its jurisdiction to issue the permit. The district court declined to enjoin the landfill project, but in the course of its opinion ruled that the 1894 Act did not diminish the reservation. *Yankton Sioux Tribe v. Gaffey*, 890 F.Supp. 878, 891 (D.S.D. 1995). A divided panel of the Court of Appeals for the Eighth Circuit affirmed, relying principally (as had the district court) upon the "savings clause" of Article XVIII of the Agreement. *Yankton Sioux Tribe v. Gaffey*, 99 F.3d 1439, 1447-48 (8th Cir. 1996). This Court granted certiorari and reversed. *Yankton Sioux Tribe*, 522 U.S. 329.[4]

The Court based its decision primarily on the plain language of the 1894 statute. In particular, the Court found that Articles I and II of the Agreement contained

---

[4] The facts set forth in this paragraph appear in *Yankton Sioux Tribe*, 522 U.S. at 340-42.

" 'cession' and 'sum certain' language [which] is 'precisely suited' to terminating reservation status." 522 U.S. at 344. The Court cited *DeCoteau*, 420 U.S. at 445, as support for that conclusion and continued:

> The terms of the 1894 [Yankton] Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau* . . . and, as in *DeCoteau* . . . the 1894 Act ratified a negotiated agreement supported by a majority of the Tribe.

522 U.S. at 344. The Court then rejected the holding of the lower courts that the Article XVIII savings clause should be given decisive effect and found that the clause was not "meaningfully distinct from the savings clauses that have failed to move this Court to find that pre-existing treaties remain in effect under comparable circumstances." *Id.* at 348.

Although earlier passages in the Court's opinion indicated that the Yankton Reservation was disestablished, the Court chose not to determine whether the reservation was "disestablished . . . altogether." *Id.* at 358. Observing that it "need not determine" that issue to decide the case before it, which involved only "ceded" lands, the Court elected to "limit [its] holding to the narrow question presented." *Id.* The Court did so after noting "conflicting understandings about the status of the reservation" and alluding to the Tribe's ownership of "land in common." *Id.* The Court therefore reversed and remanded the case to the lower courts for further action. *Id.*

C. The Second Round of Litigation.

1. On remand, the district court consolidated the Tribe's initial action with a new action brought by the Tribe to challenge state criminal jurisdiction over acts of tribal members on non-ceded land within the original reservation boundaries. The United States intervened as a party. The district court once again at App. 53, 68-69, 112, held that the original boundaries of the reservation remained intact notwithstanding this Court's statement in *Yankton Sioux Tribe*, 522 U.S. at 345, that the 1894 Act was "readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries." Thus, held the district court, all lands within those original boundaries that were not ceded in the 1894 Act remain part of the reservation, including all of the lands allotted to individual Indians (at least 85 percent of which had been transferred to non-Indians). App. 112. The court, with minimal analysis, also held that the "agency lands" which had been ceded by the Tribe to the United States under Article VIII retained reservation status. App. 112.

Although the district court's lengthy opinion cannot be fully summarized here, a few points bear mention. The district court began with the premise that this Court had ruled that "the original exterior boundaries [of the reservation] remain." App. 68. The court mentioned Articles I and II of the Agreement a single time, noting in passing only that they ceded surplus lands to the United States and thereby diminished the reservation. App. 86. The court neither quoted nor analyzed this Court's statement that the "cession and sum certain" language of Articles I and II was " 'precisely suited' to terminating reservation

status." *Yankton Sioux Tribe*, 522 U.S. at 344. Not surprisingly, then, the court concluded that "[n]othing in the explicit language of the 1892 Agreement supports disestablishment of the Reservation." App. 86.

2. The Eighth Circuit affirmed in part and reversed in part. Reversing the district court, the Eighth Circuit held following *Yankton Sioux Tribe* that the boundaries of the 1858 reservation were, in fact, eliminated. App. 26, 47. In particular, the court agreed with the State that allotted land which had left Indian ownership was no longer part of the reservation or, indeed, "Indian country" of any kind. App. 47. However, the Eighth Circuit affirmed the district court's holding that the reservation had not been "disestablished," finding that the reservation presently consists of certain former "agency lands" later conveyed to the Tribe and, potentially, thousands of acres of "trust" land. App. 48.

In holding that the 1894 Act did not disestablish the Yankton Reservation, the Eighth Circuit began, necessarily, at attempting to distinguish *DeCoteau*, in which this Court held that an agreement which ceded all of the tribe's unallotted lands for a sum certain disestablished that reservation. *See* discussion at IIA *infra*. It then found that the Yankton Agreement's "cession and sum certain" language was immaterial because it explicitly referred only to the ceded lands. App. 30, 33-37. Having brushed past the very language and rationale that controlled *DeCoteau* and *Yankton Sioux Tribe*, the court was forced to rely mainly on the bare negotiating history for guidance. The court nonetheless did acknowledge that the 1894 Act "intended to diminish the reservation by not only the ceded land, but also by the land which it foresaw would

pass into the hands of the white settlers and homesteaders." App. 43.

The breadth of the Eighth Circuit's holding is somewhat muddy. The court stated that it "cannot define the precise limits of the reservation which remains," at least in part, because the "current amount of Indian trust land on the Yankton Sioux Reservation is unclear from the record." App. 47. The court observed that the term "trust land"

> is variously used to include 1) the land reserved to the federal government in the 1894 Act and later returned to the Yankton Tribe [the agency lands], 2) land allotted to individual Indians that remains held in trust, and 3) land taken into trust under the Indian Reorganization Act of 1934.

App. 48. The court held that the first category, the one thousand plus acres of agency lands, definitely "continues to be a reservation," App. 48 – even though those lands were ceded in the 1894 Act and therefore are squarely covered by this Court's decision in *Yankton Sioux Tribe*. The court then left it "to the district court on remand to make any necessary findings relative to the status of Indian lands which are held in trust." *Id.* It thus left to the district court to determine whether allotted trust lands and lands taken into trust under the Indian Reorganization Act of 1934 (IRA) have the "status" of parcels of a "reservation" under 18 U.S.C. § 1151(a).

Petitions for rehearing were filed by the State, Charles Mix County, the Waste District, and the Tribe, but all were denied. App. 114. Chief Judge Wollman and Judges Beam and Loken would have granted the State,

County, and Waste District petitions; the latter two judges would also have granted all of the petitions. App. 114.

REASONS FOR GRANTING CERTIORARI

I. THE DECISION OF THE EIGHTH CIRCUIT SQUARELY CONFLICTS WITH THE SUBSEQUENT DECISION OF THE UNANIMOUS SOUTH DAKOTA SUPREME COURT.

One day after the Eighth Circuit issued the decision below, the South Dakota Supreme Court issued its decision in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999) (reprinted in the Appendix at 141-172), which unanimously held that the 1894 Act disestablished the Yankton Sioux Reservation. That holding directly conflicts with the Eighth Circuit's decision.

Bruguier arose from the state court conviction of James Bruguier for committing burglary in a town lying within the original boundaries of the Yankton Reservation. Specifically, the offense occurred on allotted land to which Indian title had been extinguished. App. 143. Bruguier filed a state habeas corpus petition which asserted that the reservation remained intact and that the state therefore lacked jurisdiction over the crime. *Id.* The habeas judge concluded that the reservation had been "disestablished" and denied the petition. *Id.* (By coincidence, on the same day the habeas judge signed her findings, the U.S. District Court ruled that the original reservation boundaries still existed. *Id.*). The South Dakota Supreme Court affirmed, concluding that the 1894 Act disestablished the reservation.

The South Dakota Supreme Court found that the statutory language, the historical context, and later developments in the area all strongly supported disestablishment. As to the former, the court stated that the cession and sum certain language of the Yankton Agreement "manifests an almost irrebuttable presumption of congressional intent" to disestablish. App. 157. This reading of the statutory language is supported, the court ruled, by late nineteenth century views of Indian ownership. At that time it was commonly understood that when tribal ownership was eliminated (for example, by allotting tribal land to individual Indians), a " 'critical component of reservation status' was lost." App. 161 (quoting *Yankton Sioux Tribe*, 522 U.S. at 346). The court went on to find that, "[a]lthough there are inconsistencies in this sphere also, we find little in the historical context or the Treaty negotiations to suggest that the reservation would continue." App. 164.

Following the lead of *Yankton Sioux Tribe*, the South Dakota Supreme Court also found a lack of a "jural distinction" between the 1890 Sisseton agreement at issue in *DeCoteau* and the 1892 Agreement at issue here. App. 169. The court noted the repeated references to the Sisseton Agreement during the Yankton negotiations and cited numerous similarities between the two situations: both Acts sold all unallotted lands; the Acts contained similar preamble language; opened lands on both reservations were subject to the federal homestead and townsite laws; in both instances the United States retained an agency and schools; and "[m]ost significantly no land in common was retained, no boundaries were redefined, and parcels allotted to Indians were in both instances

spread randomly across the former reservations." App. 169-170. Accordingly, the court concluded that the "intent behind" the language in the 1894 Yankton Act "is unmistakably the same" as that in the 1891 Act that disestablished the Lake Traverse Reservation. App. 170.[5]

Both the United States and the Tribe have accordingly acknowledged in this Court that the South Dakota Supreme Court found the Yankton reservation was "wholly disestablished" in *Bruguier*. "Application [of the United States] for Extension of Time Within Which to File a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit," at 5 n.1 (Feb. 28, 2000); "Application [of the Yankton Sioux Tribe] for Extension of Time Within Which to File a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit," at 4 n.1 (Mar. 3, 2000).

This Court has explained that "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). The Court has frequently granted certiorari to resolve disputes concerning the status of reservations when United States courts of appeals and state

---

[5] Prior to *Bruguier*, the South Dakota Supreme Court had several times indicated its view that the Yankton Reservation was disestablished. *See, e.g., State v. Winckler*, 260 N.W.2d 356, 360 (S.D. 1977) ("this court has ruled that the Yankton Reservation was disestablished"); *State v. Thompson*, 355 N.W.2d 349, 350-51 (S.D. 1984) (in which the court posed the question whether the Yankton reservation was "disestablished" and answered the question in the affirmative).

supreme courts were in conflict, one obvious example being in the first round of this case. *See Yankton Sioux Tribe*, 522 U.S. at 342 ("We granted certiorari to resolve a conflict between the decision of the Court of Appeals and a number of decisions of the South Dakota Supreme Court. . . . "); *see also Hagen v. Utah*, 510 U.S. 399, 409 (1994) ("We granted certiorari . . . to resolve the direct conflict between these decisions of the Tenth Circuit and the Utah Supreme Court. . . . "); *DeCoteau*, 420 U.S. at 430-31 ("We granted certiorari . . . to resolve the conflict between the Supreme Court of South Dakota and the Court of Appeals for the Eighth Circuit. . . . ").

II. THE DECISION OF THE EIGHTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT AND ESTABLISHED INDIAN LAW JURISPRUDENCE.

A. The Eighth Circuit's Decision Conflicts With *DeCoteau v. District County Court*, 420 U.S. 425 (1975), Which *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), Held to Be Squarely on Point.

This Court has already addressed the consequences of an agreement by a tribe to cede all of its unallotted reservation lands for a sum certain. In *DeCoteau*, 420 U.S. 425, this Court held that such an agreement disestablishes the reservation. As night follows day, the same result must obtain with respect to the Yankton Sioux Reservation, at least in the absence of very weighty evidence to the contrary. By holding otherwise, the Eighth Circuit failed to adhere to this Court's guiding precedent.

1. As described in *DeCoteau*, 420 U.S. at 431-44, the history of the Lake Traverse Reservation followed the same pattern as that of the Yankton Sioux Reservation. The Sisseton and Wahpeton bands of the Sioux Nation (like the Yankton Sioux) remained loyal to the United States when the Sioux Nation rebelled. This prompted the United States to enter into a treaty with the Sisseton-Wahpeton Tribe in 1867 which granted the Tribe a reservation in the Lake Traverse area. "But familiar forces soon began to work upon the Lake Traverse Reservation," *id.* at 431, forces which led to the Dawes Act and the allotment of more than 120,000 acres of the reservation. *Id.* at 438 n.19. In 1889, a series of negotiations took place that resulted in an agreement through which the Sisseton-Wahpeton Tribe agreed to cede for a sum certain all the unallotted lands within its reservation. *Id.* at 437. Additional allotments of over 110,000 acres were also provided for. *Id.* at 438 n.19. Two years later, Congress enacted a statute reciting and ratifying the agreement. Act of March 3, 1891, c. 543, 26 Stat. 1035. In *DeCoteau*, this Court held that " 'the face of the Act,' and its 'surrounding circumstances' and 'legislative history,' all point unmistakably to the conclusion that the Lake Traverse Reservation was terminated in 1891." *Id.* at 445.

In particular, the Court in *DeCoteau* pointed to the following factors as critical to its decision. First, "[t]he negotiations leading to the 1889 Agreement show plainly that the Indians were willing to convey to the Government, for a sum certain, all of their interest in all of their unallotted lands." *Id.* Second, "[t]he Agreement's language, adopted by majority vote of the tribe, was precisely suited to this purpose." *Id.* Third, that "language is

virtually indistinguishable from that used in other sum-certain cession agreements ratified by Congress in the same 1891 Act." *Id.* at 446. Fourth, the agreement was distinct from other agreements which the Court held had not changed reservation boundaries. *Id.* at 447-49. And fifth, "[u]ntil the Court of Appeals altered the status quo, South Dakota had exercised jurisdiction over the unallotted lands of the former reservation for some 80 years." *Id.* at 449.

2. Each of those factors is equally applicable to the Yankton Sioux Reservation. Most importantly, this Court recognized in *Yankton Sioux Tribe* that the terms of the 1894 Yankton Agreement "parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau*. . . . " 522 U.S. at 445. In addition, as in *DeCoteau*, "all" the unallotted lands were ceded to the United States for a sum certain in the Yankton Agreement, App. 128-29; the language of the Yankton Agreement has been found to be " 'precisely suited' " to termination, and was adopted by a majority of the tribe, 522 U.S. at 344; the language is "virtually indistinguishable" from other cession and sum certain agreements identified in *DeCoteau*; the Yankton Agreement has been held to be "readily distinguishable" from agreements which preserved reservation boundaries, *id.* at 345; and South Dakota had no doubt exercised jurisdiction over the unallotted lands for more than 80 years. *Id.* at 357.[6]

---

[6] There are, in fact, at least 18 points of identity between the two Agreements:

1. **Time period equivalent.** Sisseton-agreement approved 1891, 26 Stat. 1035 (1891); Yankton-1894, 28 Stat. 286 (1894).

The Eighth Circuit nonetheless held that *DeCoteau* did not control, citing two specific distinctions between

---

2. **Allotment under General Allotment Act.** Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 314.

3. **Similar acreage allotted.** Sisseton-256,000 acres, 1995 Exhibit 610; Yankton-262,000 acres, 1995 Exhibit 610.

4. **Similar per capita acreage allotted.** Sisseton-168 acres per capita, 1995 Exhibit 610; Yankton-152 acres per capita, 1995 Exhibit 610.

5. **Interior instructions to Commissioners equivalent.** Sisseton, letter from Commissioner of Indian Affairs of August 13, 1889; Yankton, letter from Commissioner, J.T. Morgan, Department of Interior to Commissioners of July 27, 1892.

6. **Preambles equivalent.** Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 314.

7. **Cession language used in both.** Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 314.

8. **All unallotted lands ceded in both.** Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 314.

9. **Sum certain language used in both.** Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 315.

10. **Entry subject to homestead and townsite laws in both.** Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 319.

11. **Missionaries allowed to purchase lands in both.** Sisseton, 26 Stat. 1035, 1037; Yankton, 28 Stat. 286, 316.

12. **School lands granted in both.** Sisseton, 26 Stat. 1035, 1039; Yankton, 28 Stat. 286, 319.

13. **United States retained an agency and schools in both.** Sisseton, 26 Stat. 1035, 1037; *DeCoteau*, 420 U.S. at 435 n.16; *Id.* at 438 n.19; Yankton, 28 Stat. 286, 316; *Yankton*, 522 U.S. at 336.

14. **Allotments were throughout the former reservation in both.** Sisseton, *DeCoteau*, 420 U.S. at 428; Yankton, *Yankton*, 522 U.S. at 326.

the Sisseton-Wahpeton and Yankton Agreements, and stating generally that the "circumstances surrounding the negotiation[s]" and "the content and wording of the agreements" were very different. App. 23. The latter point flies directly in the face of this Court's statement in *Yankton Sioux Tribe*, 522 U.S. at 344, that Articles I and II of the two Agreements were virtually identical and that the "terms" of the agreements are "parallel." Insofar as we can tell, the only support the Eighth Circuit provides for its conclusion that the Agreements may be distinguishable is that the Sisseton-Wahpeton Agreement "negotiated allotments for each individual, including married women." App. 23. The court does not explain why this should be decisive of disestablishment, and the actual statistics show, in any event, that the *per capita* lands taken in allotted status at the Lake Traverse Reservation and at the Yankton Reservation were approximately the same: 168 acres and 152 acres, respectively.[7]

---

15. **Presidential proclamation opening the reservation referred to "cession language" in both.** Sisseton, 27 Stat. 1017; Yankton, *Yankton*, 522 U.S. at 354.

16. **Presidential proclamation opening the reservation referred to "Schedule of lands within . . . the Reservation . . . " in both.** Sisseton, 27 Stat. 1017, 1018 (1892); Yankton, 29 Stat. 865, 866 (1895).

17. **State assumed virtually unquestioned jurisdiction in both.** Sisseton, *DeCoteau*, 420 U.S. at 442; Yankton, *Yankton*, 522 U.S. at 357.

18. **Two situations generally treated in parallel fashion on maps.** Sisseton and Yankton, Exhibit 620, JA 412 (1901); Exhibit 621, JA 413 (1910); Exhibit 44, JA 549 (1909).

[7] Sisseton tribal members took approximately 256,000 acres as allotments, *see DeCoteau*, 420 U.S. at 435 n.16, and Sisseton in

As to the negotiating history, the Eighth Circuit found that the "background" of the Sisseton-Wahpeton Agreement was "very different . . . because the tribal members there had expressed their clear desire to terminate their reservation." App. 23. Yet in support of this, the court appears to cite nothing more than a press report (quoted in *DeCoteau*, 420 U.S. at 432-33), in which Sisseton-Wahpeton tribal spokesmen are reported to have said that "[w]e never thought to keep this reservation for our lifetime." That is a very slender reed upon which to rest a fundamental distinction between the Agreements, particularly in light of the letter written by three Yankton chiefs and more than 100 members of the Yankton Tribe to the Congress stating that they

> "want[ed] the laws of the United States and the State that we live in to be recognized and observed," and that they did not view it as desirable to "keep up the tribal relation . . . as the tribal relation on this reservation is an obstacle and hindrance to the advancement of civilization."

Yankton, 522 U.S. at 353 (quoting S. Misc. Doc. No. 134, 53d Cong., 2d Sess., 1 (1894)). The State agrees, of course, with the Eighth Circuit "that similar treaty language does not *necessarily* have the same effect when dealing with separate agreements." App. 23 (emphasis added). But this argument surely lacks validity when this Court has tied two agreements as closely together as *Yankton Sioux Tribe*,

---

1890 had 1,522 residents. Exhibit 610, JA 305. Yankton tribal members took approximately 262,000 acres in allotments, *see Yankton*, 522 U.S. at 336, and Yankton in 1890 had 1,725 residents. Exhibit 610, JA 305.

522 U.S. at 344, tied the Yankton and Sisseton Agreements. Moreover, no factual or legal distinction put forward by the Eighth Circuit or the parties below warrants the conclusion that the "parallel language" of the Sisseton-Wahpeton and Yankton Agreements should not be given the same effect.

B. The Eighth Circuit's Decision to Carve Out Three Categories of "Trust Land" as Reservation Land Contravenes This Court's Precise Holding in *Yankton*, Established Indian Law Jurisprudence, and Common Sense.

Having erroneously concluded that the 1892 Yankton Agreement contemplated continued "reservation" status of certain "trust lands," the Eighth Circuit went about determining what particular lands fit within that category. The court, as noted, came up with three types of trust lands that retained, or may have retained, reservation status. Upon closer inspection, however, it becomes apparent that case law, established jurisprudence and a common-sense reading of the Agreement dictate that none of those three types of "trust lands" possibly retained "reservation" status.

1. The first of the three categories of trust land described by the Eighth Circuit is the one thousand plus acres of agency land which had been "ceded" for payment to the United States under Article VIII of the Agreement, utilized by the United States for about thirty-five years, and then transferred to the Tribe at some point

after 1929.[8] The most obvious problem with the Eighth Circuit's holding that this land "continues to be a reservation" (App. 48) is that it contradicts the direct holding of *Yankton Sioux Tribe*. In that decision, this Court unequivocally held that "the unallotted lands ceded as a result of the 1894 Act did not retain reservation status." 522 U.S. at 342. Because the "agency land" had been "ceded" to the United States, as the opinion of the court of appeals acknowledges (App. 20), it falls within the precise holding of this Court. It comes as no surprise, then, that there is no mention of a mile square "reservation" in the 1894 Agreement or in the contemporaneous negotiations.

Even if the court of appeals could conceivably undermine this Court's precise holding, it failed to do so. In this regard, it is noted that Article VIII of the Agreement (on which the court of appeals relied) provided that the lands would be "reserved from sale to settlers until they are no longer required for [agency, schools and other purposes]." App. 132. The Act of February 13, 1929, 45 Stat. 1167, which implemented this provision, provided that the lands should be disposed of to the tribe, rather than to the settlers, but retained the requirement that

---

[8] See also, text accompanying n.3, *supra*. After the Eighth Circuit's opinion, the County attempted to put before the Eighth Circuit evidence demonstrating that no *actual* transfer occurred until the 1950s, and that no trust status was conferred on the land until that time, and also attempted to put before the court the very minimal use of the lands. The Respondents here attempted to introduce other information they deemed relevant. The court of appeals denied the motion to add the evidence to the record but suggested that the information could be sought to be introduced on remand to the district court. App. 173.

disposal could occur only "when they are no longer required for agency, schools, or other purposes." According to the Solicitor, that day arrived by 1934. Ex. 627, JA 572.

Alaska v. Native Village of Venetie, 522 U.S. 520, 527 (1998) identifies two "requirements" which are "necessary" for the finding of "Indian country" generally:

> [The lands] must have been set aside by the Federal Government for the use of the Indians as Indian lands; second, they must be under federal superintendence.

Because the ceded agency lands could be transferred *only* when the government no longer intended to use them for any purpose, they could hardly be argued to thereafter be "set aside as Indian lands" and most definitely could not thereafter be argued to "be under federal superintendence."[9]

2. The Eighth Circuit next held that allotted lands which remain in trust – and are therefore "Indian country" under 18 U.S.C. § 1151(c) – might also be "reservation" land. There are a number of difficulties with that holding. First, it is established law that reservation land cannot lose its Indian country status by virtue of a transfer. *See Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Yet, as

---

[9] This is further confirmed by S. Rep. No. 1130, 70th Cong., 1st Sess. (1928), Ex. 522, JA 723-24, in which the Department of Interior objects to the then pending bill: "It would be a step backward in that it would necessarily limit the jurisdiction of the Federal Government over the reserved area and bring about some undesirable conditions that could not be readily controlled."

even the Eighth Circuit acknowledged, land allotted to Yankton Tribe members which had been transferred to non-Indians *did lose* its "Indian country" status. App. 47. This means none of the "allotted lands" could have been within a "reservation" after the 1894 Act or they would *not* have lost their "Indian country" status by transfer. The Eighth Circuit nonetheless held they did lose "Indian country" status when they passed from Indian ownership. The decision below thus creates a clear doctrinal impossibility.

Second, the decision ignores the rationale that informed the *DeCoteau* Court – when "cession and sum certain" language is used, reservation status is terminated for all lands, at least when all of the unallotted lands are ceded so that the tribe retains no lands in common. *DeCoteau*, in discussion of other agreements, noted that the

> Indians [in the other agreements] sold only a described portion of their lands, rather than all "unallotted" portions, the result being merely a reduction in the size of the affected reservations.

420 U.S. at 439. In *DeCoteau*, in contrast, *all* of the unallotted lands were sold to the United States by the use of the weighty "cession and sum certain language," and the reservation was thus subject to "termination." 420 U.S. at 449. *DeCoteau* also points out that it might have been better to have "carved out a diminished reservation" rather than have ceded "all, rather than a major portion of the tribe's allotted lands." *Id.* at 446-47. That was not, however, accomplished, and, as this Court concluded, "we cannot remake history." *Id.* at 449. Nothing in *Yankton Sioux Tribe* detracts from this analysis. The court

below thus ignores the rationale underlying *DeCoteau* and *Yankton Sioux Tribe* when it finds that "allotted" lands remained in "reservation" status.

Finally, the finding of the court below that scattered and noncontiguous allotted land may also be "reservation" is inconsistent with the meaning and development of the term "Indian country." As codified in 18 U.S.C. § 1151, there are three categories of Indian country: (a) all lands within reservations, (b) dependent Indian communities, and (c) Indian allotments, "the Indian titles to which have not been extinguished." As this Court recently reconfirmed in *Native Village of Venetie*, 522 U.S. at 528-29, the § 1151(c) category is derived from *United States v. Pelican*, 232 U.S. 442, 449 (1914), in which the Court "held that Indian allotments – parcels of land created out of a diminished Indian reservation and held in trust by the Federal Government for the benefit of individual Indians – were Indian country." *See also DeCoteau*, 420 U.S. at 427 n.2, 446-47. The Court in *Native Village of Venetie*:

> Before § 1151 was enacted, we held in three cases that Indian lands that *were not reservations* could be Indian country and that the Federal Government could therefore exercise jurisdiction over them. *See . . . United States v. Pelican*, 232 U.S. 442 (1914).

522 U.S. at 528 (emphasis added). The present-day allotted lands fitting within the Eighth Circuit's second category of trust land are such § 1151(c) lands. The Eighth Circuit's decision undermines the well-defined categories set out in statute and case law. Moreover, it suggests that Congress deliberately determined that a "reservation"

which had existed should be transformed into one which consists of scattered and noncontiguous "allotted lands," and not all lands within specified boundaries. The court below cited no precedent for this novel historical and legal view.

3. Third, the Eighth Circuit held that lands acquired in trust by the United States since 1934 under the Indian Reorganization Act might attain "reservation" status. It is fanciful to believe, however, that the framers of the Yankton Agreement – who acted at a time when Congress was actively seeking to end the reservation system – anticipated that some forty years later Congress would enact a statute under which the United States would take former reservation land and place it in trust. It is equally fanciful to believe that framers of the 1894 Act intended that lands lost from allotted status would regain "reservation" status by virtue of the 1934 Act.

If we move from the Agreement directly to the scope and operation of the IRA, the Eighth Circuit's approach fares no better. The United States can deliberately create "reservations" from land taken in trust under IRA, but to do so it must follow procedures set forth in Section 7 of the statute, *codified* at 25 U.S.C. § 467. No showing has been, or could be, made that the United States invoked Section 7 with respect to any land within the boundaries of the original Yankton Reservation. Not only does the mere taking of land into trust not make it "reservation" land. The Eighth Circuit has held that taking land into trust does not even make such land "Indian country." *See United States v. Stands*, 105 F.3d 1565 (8th Cir. 1997), *cert. denied*, 522 U.S. 841 (1998); *but see United States v. Roberts*,

185 F.3d 1125 (10th Cir. 1999) (petition for writ of certiorari pending at Docket No. 99-1174).

III. THE ISSUES RAISED BY THIS CASE ARE IMPORTANT AND RECURRING.

The conflict between the Eighth Circuit and the South Dakota Supreme Court creates serious practical difficulties for all governmental agencies attempting to administer the disputed area and for all those who live in the area. This is so because the two courts differ as to the amount of Indian country within the boundary of the original reservation, and land's status as "Indian country" has profound jurisdictional consequences. Civil and criminal jurisdiction, regulatory authority, and authority with regard to taxation are all deeply impacted by the determination that land is "Indian country." *See* Wrend and Smith, *American Indian Law Deskbook*, at 36-37 (2d ed. 1998). In particular, a state loses much of its preexisting jurisdiction over civil causes of action arising in "Indian country." *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (tribe lacks jurisdiction claim against nonmember in accidents occurring on state right-of-way); *Williams v. Lee*, 358 U.S. 217 (1959) (state lacks jurisdiction of claim of non-Indian against Indian for reservation transaction). Similarly, the state's ability to impose various taxes is deeply impacted by the existence of "Indian country." *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993). In addition, the courts have found that the state surrenders virtually all of its criminal jurisdiction

with regard to incidents involving Indians in "Indian country." *See American Indian Law Deskbook, supra,* 98-100.

The decision, moreover, seriously upsets the law of disestablishment in the Eighth Circuit and potentially beyond. The decision of the panel will be argued to create a rule that, when Congress and the tribe agree to diminish or disestablish an area, lands which the United States retains in agency or similar status will nonetheless retain "reservation" status. Importantly, lands which have "reservation status" cannot lose that status without further direct congressional authority. *See Solem,* 465 U.S. at 470.

In the case of South Dakota, this might be argued to mean that land retained for agency and school purposes within the former Sisseton "reservation" nonetheless retained "reservation" status. *See,* indicating the existence of such lands, *DeCoteau,* 420 U.S. at 435 n.16, 438 n.19; Ex. 571, JA 975-77 (1895 Sisseton Agency and buildings described); 39 Stat. 969 (1917) ("Sisseton Indian Agency buildings").

Similarly, the Act of April 23, 1904, 33 Stat. 254, which disestablished Gregory County, *see Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 603 (1977), contains Article V, § 2 which reserves lands for a subissue station, an Indian day school, and three missions. Article 1 of the Act of May 30, 1910, 36 Stat. 448, which disestablished Mellette County, *Rosebud,* 430 U.S. at 615, provides that the Secretary may reserve land for "agency, school and religious purposes." Bennett County has been held to be "sever[ed]" from the Pine Ridge Reservation by *United States ex rel. Cook v. Parkinson,* 525 F.2d 120, 122 (8th Cir.

1975), *cert. denied*, 430 U.S. 980 (1977). Nonetheless, Section 1 of the Act of May 27, 1910, 36 Stat. 440, provided that the Secretary could reserve such lands for "agency, school and religious purposes" for as long as needed; moreover, Section 3 of the Act provided that all "timber lands" were "reserved."

The retention of certain lands and areas by the United States for various purposes in diminishment and disestablishment situations was commonplace. Indeed it was clearly necessary because Indians needing assistance remained in the areas. There is no evidence, however, that the Congress intended the areas to have a "reservation" status despite the diminishment or disestablishment of the remainder of the area – indeed such has never even been argued, and no case has been cited in which such lands have been held to retain "reservation" status. The decision of the panel below, however, will invite litigation with regard to each of these parcels throughout South Dakota, and in every other state in which these commonplace provisions existed.

Finally, the suggestion of the panel that mere "trust" or "allotted" lands in diminished or disestablished reservation areas might retain or somehow have been revested with "reservation" status will likewise raise difficulties in every area subjected to disestablishment or diminishment. There are approximately 47,000,000 acres of allotted land and over 9 million acres of post-1934 trust land in thirty-six different states, and a significant (though unknown) amount of such land is surely beyond reservation boundaries. To place this land, or a significant portion of it, in battles to determine if it qualifies as "reservation" is surely unjustified by any precedent of

this Court and can only result in unproductive and devisive litigation.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MARK W. BARNETT
Attorney General
State of South Dakota

JOHN PATRICK GUHIN
Deputy Attorney General
Counsel of Record
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioners

APPENDIX

APPENDICES

Opinion of the United States Court of Appeals for the Eighth Circuit, Aug. 31, 1999 .....App. 1

Memorandum Opinion and Order of the United States District Court for the District of South Dakota, Southern Division, Aug. 14, 1998 ....App. 50

Order Denying Petition for Rehearing and for Rehearing En Banc of the United States Court of Appeals for the Eighth Circuit, Dec. 8, 1999 .....App. 114

Treaty with the Yankton Sioux, 1858 .....App. 115

Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1894 .....App. 127

Opinion of the Supreme Court of the State of South Dakota in *Bruguier v. Class*, Sept. 1, 1999 .....App. 141

Order of the United States Court of Appeals for the Eighth Circuit, Dec. 9, 1999.....App. 173

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3893

Yankton Sioux Tribe, and its individual members, Appellee, United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe, Intervenor Plaintiff – Appellee, v. Matt Gaffey, States Attorney of Charles Mix County; Herman Peters, Member of the Charles Mix, South Dakota, County Commission; Bruce Bakken, Member of the Charles Mix, South Dakota, County Commission; Jack Soulek, Member of the Charles Mix, South Dakota, County Commission, Appellants, William Janklow, Governor of South Dakota; Mark W. Barnett, Attorney General of South Dakota, Defendants.	*	Appeals from the United States District Court for the District of South Dakota.

Gary Beeson, Landowner; City of Dante; City of Geddes; City of Lake Andes; City of Pickstown; City of Platte; City of Ravinia; City of Wagner; Harvey P. Weisser, doing business as Weisser Oil Co., Inc., Individually,

Amici on Behalf of Appellant,

Vine Deloria, Jr.; Philip S. Deloria; Philip Lane, Sr.; Philip Lane, Jr.; James Weddell, descendants of Francois Deloria, Signatory to the Treaty of 1858, and descendants and relatives of Philip J. Deloria,

Amici on Behalf of Appellee.

No. 98-3894

Yankton Sioux Tribe, and its individual members,

Appellee,

United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe,

Intervenor Plaintiff – Appellee,

v.

Matt Gaffey, States Attorney of Charles Mix County; Herman Peters, Member of the Charles Mix, South Dakota, for County Commission; Bruce Bakken, Member of the Charles Mix, South Dakota, County Commission; Jack Soulek, Member of the Charles Mix, South Dakota, County Commission,

Defendants,

William Janklow, Governor of South Dakota; Mark W. Barnett, Attorney General of South Dakota,

Appellants.

Gary Beeson, Landowner; City of Dante; City of Geddes; City of Lake Andes; City of Pickstown; City of Platte; City of Ravinia; City of Wagner; Harvey P. Weisser, doing business as Weisser Oil Co., Inc., Individually,

Amici on Behalf of Appellant,

Vine Deloria, Jr.; Philip S. Deloria; Philip Lane, Sr.; Philip Lane, Jr.; James Weddell, descendants of Francois Deloria, Signatory to the Treaty of 1858, and descendants and relatives of Philip J. Deloria,

Amici on Behalf of Appellee.

No. 98-3896

Yankton Sioux Tribe, and its individual members; Darrell E. Drapeau, individually, a member of the Yankton Sioux Tribe,

Appellees,

v.

Southern Missouri Waste Management District, a non-profit corporation,

Defendant,

v.

State of South Dakota,

Third Party Defendant – Appellant.

Gary Beeson, Landowner; City of Dante; City of Geddes; City of Lake Andes; City of Pickstown; City of Platte; City of Ravinia; City of Wagner; Harvey P. Weisser, doing business as Weisser Oil Co., Inc., Individually,

Amici on Behalf of Appellant,

Vine Deloria, Jr.; Philip S. Deloria; Philip Lane, Sr.; Philip Lane, Jr.; James Weddell, descendants of Francois Deloria, Signatory to the Treaty of 1858, and descendants and relatives of Philip J. Deloria,

Amici on Behalf of Appellee.

No. 98-3900

Yankton Sioux Tribe, and its individual members; Darrell E. Drapeau, individually, a member of the Yankton Sioux Tribe,

Appellees,

v.

Southern Missouri Waste Management District, a non-profit corporation,

Appellant,

v.

State of South Dakota,

Third Party Defendant.

Gary Beeson, Landowner; City of Dante; City of Geddes; City of Lake Andes; City of Pickstown; City of Platte; City of Ravinia; City of Wagner; Harvey P. Weisser, doing business as Weisser Oil Co., Inc., Individually,

Amici on Behalf of Appellant,

Vine Deloria, Jr.; Philip S. Deloria; Philip Lane, Sr.; Philip Lane, Jr.; James Weddell,

descendants of Francois Deloria, Signatory to the Treaty of 1858, and descendants and relatives of Philip J. Deloria,

Amici on Behalf of Appellee.

Submitted: June 17, 1999
Filed: August 31, 1999

Before RICHARD S. ARNOLD, MAGILL, AND MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

Before the court are several appeals from judgments concerning lands once recognized to be part of the Yankton Sioux Reservation. After the Supreme Court decided in *South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789 (1998) (*Yankton*), that the reservation had been diminished at the end of the nineteenth century when the Yankton Sioux Tribe (Tribe) ceded land to the United States, that case was remanded for further proceedings.[1] In the district court the case was then consolidated with an action

---

[1] *See Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 141 F.3d 798 (8th Cir. 1998). Earlier in the history of the case we upheld the district court's previous ruling that the reservation had been neither disestablished nor diminished. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 890 F. Supp. 878 (D.S.D. 1995), *aff'd*, 99 F.3d 1439 (8th Cir. 1996), *rev'd*, 118 S. Ct. 789 (1998).

brought by the Tribe to challenge state criminal jurisdiction over acts of tribal members on nonceded land within the original reservation boundaries. After an evidentiary hearing, the district court granted declaratory relief to the Tribe, its individual members, and its chairman Darrell Drapeau, and issued permanent injunctions enjoining state officials from exercising criminal jurisdiction over tribal members on "allotted or reserved lands." *Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d 1135, 1160 (D.S.D. 1998). The district court concluded that the reservation has not been disestablished and still includes all land within the original exterior reservation boundaries that was not ceded to the United States. *See id.* at 1159. The State of South Dakota (State), the Southern Missouri Waste Management District (District), and the individual named state and county officials appeal.[2]

We affirm the conclusion that the reservation was never clearly disestablished, but we reverse the conclusion that the original exterior boundaries of the reservation continue to have effect and that all nonceded lands remain part of the reservation. We also vacate the injunctions issued in the district court and remand the cases for further proceedings consistent with this opinion.

---

[2] The named defendants in the declaratory judgment action were Matt Gaffey, States Attorney of Charles Mix County and four members of the Charles Mix, South Dakota, County Commission (collectively "county officials"), as well as William Janklow, Governor of South Dakota and Mark W. Barnett, Attorney General of South Dakota (collectively "state officials").

I.

The original boundaries of the Yankton Sioux Reservation were defined in a treaty between the United States and the Yankton Sioux Tribe on April 19, 1858, 11 Stat. 743 (1858 Treaty), to include approximately 400,000 acres in what is now Charles Mix County, South Dakota.[3] The Supreme Court held in *Yankton* that the reservation was diminished by land ceded to the United States under an 1892 agreement, later ratified by Congress in 1894. Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 314-19 (1894 Act). The specific question before the Court in *Yankton* was whether the Tribe continued to have jurisdiction over a portion of the ceded land on which the District planned to build a landfill. The Court focused its discussion on that issue, holding unanimously that the Yankton Sioux Reservation had been diminished by the 1894 Act, at least to the extent of the tracts ceded to the United States, and that the State has primary jurisdiction over all ceded lands including the waste site. *See Yankton*, 118 S. Ct. at 805.

---

[3] The reservation was later surveyed and found to comprise 430,405 acres. *See Letter from the Commissioner of Indian Affairs to the Secretary of the Interior* (Dec. 9, 1983), *reprinted in*, S. Exec. Doc. No. 27, 53d Cong., 2d Sess., 1, 5 (1894) (1894 Commissioner Letter). It is estimated that under the Dawes Act, 167,325 acres were allotted and patented, and that an additional 95,000 acres were allotted after passage of the 1891 Act, leaving 168,000 acres of unallotted lands to be ceded through the 1894 Act. *See id.* The figures from the 1894 Commissioner Letter have been used by the parties throughout this litigation. Nevertheless, we note that the Court of Claims found in 1980 that the Yankton Sioux had ceded 201,110 unallotted acres through the 1894 Act. *Yankton Sioux Tribe v. United States*, 623 F.2d 159, 184 (Ct. Cl. 1980).

A.

The district court held an evidentiary hearing after *Yankton* was remanded and consolidated with the second case, and later ruled that the Yankton Sioux Reservation had not been disestablished and that it had only been diminished to the extent of the ceded lands. *Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d 1135 (D.S.D. 1998). The court noted that nothing in the explicit language of the 1892 agreement supports disestablishment, but that several articles support the conclusion that a diminished reservation remains intact. *Id.* at 1149-56. It also referred to the reports of the council meetings with the Tribe, which do not discuss boundary changes or relinquishment of the reservation, but indicate that the 1892 agreement "memorialized only the consent of the Tribe to sell the surplus lands." *Id.* at 1145. The efforts to have the tribal members live close to white settlers were not intended to eliminate the reservation, but to help the Indians adapt to changed conditions. *Id.* at 1146-47. The Indians could have concluded from the representations made by the government negotiators that they would retain independent powers of self government over their lands. *Id.* at 1147. The district court held that the Yankton Sioux Reservation consists of all nonceded land "within the original exterior 1858 treaty boundaries," including those parcels now owned by non Indians, as well as Indian owned land and the land reserved from sale in the 1892 agreement for agency, school, and other tribal purposes. *Id.* at 1159. It concluded that primary criminal and civil jurisdiction over these lands belongs to the Tribe and the United States. *Id.* The court then issued declaratory judgments and enjoined state and county officials from exercising criminal law

enforcement jurisdiction over tribal members alleged to have committed crimes on reservation land. *Id.* at 1159-60.

The State, the District, and the individual state and county officials appealed from these judgments in four separate appeals which have been consolidated by this court. A motion to expedite the appeals was also granted.[4] The four groups of appellants all present complementary arguments; they will be referred to collectively as "the State" when their arguments do not differ. The United States offers numerous arguments supportive of the Tribe's position; both appellees will be referred to collectively as "the Tribe" except where their arguments

---

[4] Several other motions have been filed. The County has moved to have the briefs to the Supreme Court lodged with the clerk. The Supreme Court briefs were made part of the record in the district court and are available online. The motion is denied since the briefs are already available. The Tribe and the United States have moved to strike portions of the District's brief and to strike the amicus briefs of Gary Beeson and the Cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia, and Wagner (collectively Cities). In addition, the Tribe has moved to strike the amicus brief of Harvey P. Weisser. All the motions to strike allege that the challenged briefs refer to documents which are not part of the record on appeal and thus violate Fed. R. App. P. 10(a). With the exception of the affidavits of Jonelle J. Drapeau and Ed Zylstra, submitted as addenda to the amicus brief of the Cities, the challenged references do not deal for the first time with key factual material about which the opposing parties were unaware. The motions to strike portions of the District's brief and portions of the Weisser and Beeson briefs are denied. The motions to strike the Cities' brief are granted only to the extent that they seek to strike the Drapeau and Zylstra affidavits; these affidavits are stricken and have not been considered.

diverge. Each side basically argues that it is entitled to win on all issues left open by the Supreme Court in *Yankton*. The contentions between them primarily involve questions of law which we review de novo, although any factual findings are reviewed for clear error. *See* Fed. R. Civ. P. 52(a).

The State asserts that the 1894 Act disestablished the Yankton Sioux Reservation and that the only remaining Indian country within the original boundaries are "Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. § 1151(c). It claims that the Supreme Court held in *Yankton* that the reservation boundaries did not remain intact and that it also implied that *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (finding the Lake Traverse Reservation completely disestablished), controls the outcome here. The State interprets the text of the 1894 Act and its legislative history as illustrating the parties' intent to eliminate the reservation, and it finds further support for this position in the subsequent treatment of the area. It argues that immediately following the 1894 Act the Tribe itself did not hold any land in common, and the State's exercise of jurisdiction over the area has led landowners to develop reasonable expectations that their lands are not Indian country.

The Tribe argues that the district court correctly ruled that all the nonceded land within the original exterior reservation boundaries constitutes the present Yankton Sioux Reservation.[5] The Supreme Court finding of diminishment in *Yankton* does not mean that the reservation

---

[5] The district court observed that the Tribe's Constitution as amended in 1990 claimed jurisdiction "extending to the

boundaries did not continue as before, and it cites in support the Tenth Circuit's decision in *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 1034 (1998). The Tribe argues that *DeCoteau* does not control because each agreement and treaty with an Indian tribe is unique and must be examined in light of the circumstances surrounding its passage. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 119 S. Ct. 1187, 1203 (1999). It contends that the required clear statement of congressional intent to disestablish the reservation cannot be found in the text of the 1894 Act, the legislative history, or the historical circumstances surrounding its passage. It argues instead that these documents show that Congress and the parties who negotiated the agreement intended all the nonceded land to retain its reservation status.

B.

The *Yankton* Court explicitly limited the scope of its holding to the status of the ceded lands. Those "surplus" lands were intended by the 1892 agreement to be sold to white settlers, but a small amount of unallotted land was reserved from sale for use by the federal government. This land was returned to the Tribe in 1929 and remains under its control. *See* Act of February 13, 1929, ch. 183, 45 Stat. 1167. The Supreme Court refrained from going beyond what was necessary for it to decide in *Yankton*, and it did not determine issues of current jurisdiction

---

original exterior 1858 boundaries." *Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d at 1157. *But see Yankton*, 118 S. Ct. at 804-05 (quoting the Constitution drafted in 1932 and amended in 1962).

over the nonceded lands which were reserved from sale or were originally allotted to individual tribal members. *See Yankton*, 118 S. Ct. at 805.

Allotment is a term of art in Indian law. It refers to the distribution to individual Indians of property rights to specific parcels of reservation. *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 142 (1972). The rights of use and occupancy to these lands were initially held in common by the Tribe, and the federal allotment policy sought to advance assimilation of the Indians by promoting its prevailing concept of individual land ownership. The practice of allotting reservation land began with the 1887 passage of the General Allotment Act (Dawes Act), ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. § 331). Under the Dawes Act individual tribal members received patents for allotments of reservation land in parcels of up to 160 acres, to be held in trust by the federal government for twenty five years. At the end of the trust period the United States would convey the allotment in fee to the individual allottee, who would then be subject to the civil and criminal laws of the State or Territory in which he resided. *Id.* at 389-90. At the time there was increasing pressure for western land for white settlers, and the Dawes Act provided that the Secretary of the Interior could negotiate with an Indian tribe to purchase all unallotted lands. *Id.* The act was thus a two pronged effort to open up lands for white settlement and to encourage assimilation of the Indians. It was considered a critical element in assimilation because the Indian concept of tribal control over land was fundamentally

different from the European American concept of individual land ownership. *See* Felix Cohen, *Handbook of Federal Indian Law* 131-32 (1982 ed.).

Approximately three-fifths of the Yankton Sioux Reservation was allotted under the Dawes Act and an act of February 28, 1891, ch. 383, 26 Stat. 794 (amending and extending the Dawes Act). Although the trust period was initially set at twenty five years, it was terminated early for some allotments and extended for others. At least eighty five percent of the land allotted on the Yankton Sioux Reservation eventually passed out of trust status; most of this land was sold in fee to non Indians. The allotment policy was later repudiated by the passage of the Indian Reorganization Act in 1934, which prohibited further allotment of reservation land and indefinitely extended the trust period for the remaining trust lands. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-77). The record is far from crystal clear about the specific lands remaining in trust on the Yankton Sioux Reservation, but it appears such land is interspersed in a checkerboard pattern with ceded lands and lands which have passed out of trust status and are now owned in fee.

The land ceded to the United States under the 1894 Act was subsequently sold to homesteaders, but the lands allotted to individual Indians continued to be held by the United States in trust for them. Many of these parcels soon lost their trust status. The Burke Act, ch. 2348, 34 Stat. 182 (1906) (codified at 25 U.S.C. § 349), permitted the government to take certain allotted lands out of trust status before the twenty five year time period expired and to grant the individual Indian allottees unrestricted

fee title to the land. In addition, the trust period on lands which had been allotted within a few years of the passage of the Dawes Act in 1887 began to expire in the first part of the twentieth century. At that time it was understood that when an allotment passed out of trust status and the allottee received the land in fee, he also became subject to the civil and criminal laws of the State, *see* Dawes Act, 24 Stat. at 389-90, and could then sell his land to non Indians if he chose.

As federal policy began shifting away from allotment, the federal government acted to protect the trust status of the remaining allotments which had not yet lost that status. In 1916, an executive order was issued extending the trust period on all but approximately 150 of the parcels still held in trust on the Yankton Sioux Reservation. Exec. Order No. 2363, Apr. 20, 1916. The trust period for these allotments was extended again in 1926 and 1929, Exec. Order No. 4406, Mar. 30, 1926; Exec. Order No. 5173, Aug. 9. 1929, and then indefinitely in 1934 by the Indian Reorganization Act, § 2, ch. 576, 48 Stat. 984, 984 (1934) (codified at 25 U.S.C. § 462). As a result of this history, the majority of residents in many areas of the original Yankton Sioux Reservation are non Indian.[6] *See* U.S. Dept. of Commerce, Census Bureau,

---

[6] According to the 1990 Census, the overall area was approximately two-thirds non Indian, and although the tribal presence in the area has been increasing since the Fort Randall Casino was built, *see Yankton*, 118 S. Ct. at 804, it appears that non Indians own the bulk of the land within the original reservation boundaries. Municipalities such as Lake Andes and Wagner, for example, have non Indian majorities even though they are partially located on lands originally allotted to

1990 Census of Population, General Population Characteristics, South Dakota 29 tbl. 13 (1990 Census).

These appeals concern the undetermined current status of the 262,000 acres originally allotted to tribal members, some of which remain in trust, but the bulk of which have lost their trust status and are owned in fee by non Indians. The Supreme Court explained in *Yankton* that "[t]he conflicting understandings about the status of the reservation, together with the fact that the Tribe continues to own land in common, caution us . . . to limit our holding to the narrow question presented: whether unallotted, ceded lands were severed from the reservation." *Id.* It answered that question by holding that the ceded lands were severed and the reservation diminished to that extent. *Id.* We are called on now to address questions intentionally left open in *Yankton* – whether the Yankton Sioux Reservation was disestablished, and if not, whether the reservation has been diminished beyond the nonceded lands.

C.

Although the terms "diminished" and "disestablished" have at times been used interchangeably, disestablishment generally refers to the relatively rare elimination of a reservation while diminishment commonly refers to the reduction in size of a reservation. *Compare DeCoteau*, 420 U.S. 425; *with Rosebud Sioux Tribe v.*

---

individual Yankton tribal members. The Tribe has apparently recently purchased additional land in the area and has petitioned the United States to take it into trust.

Kneip, 430 U.S. 584 (1977); *see also Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439, 1443 n.4 (8th Cir. 1996). A finding of diminishment generally suggests that a discrete, easily identifiable parcel of land has been removed from reservation status. *See, e.g., Rosebud Sioux Tribe*, 430 U.S. at 615. The 168,000 acres by which the reservation was found diminished in *Yankton* are not contiguous, however, and no single boundary line can encompass these lands.

The question here is one of jurisdiction, that is to what extent the Tribe retains jurisdiction over any nonceded land within the original reservation boundaries. Congress clarified tribal jurisdiction by statute in 1948. For the Tribe to have jurisdiction over any land under the current statute it must qualify as Indian country pursuant to 18 U.S.C. § 1151. The statute defines Indian country to include all reservation land (§ 1151(a)), dependent Indian communities (§ 1151(b)), and allotments "the Indian titles to which have not been extinguished" (§ 1151(c)). If a reservation exists, the Tribe maintains jurisdiction over all land within its limits, § 1151(a),[7] but if there is no reservation, the State has primary jurisdiction over all land except allotments which continue to be held in trust,

---

[7] It is undisputed that there are broad areas over which the Tribe cannot have exclusive jurisdiction regardless of territorial jurisdiction. For example, tribes do not have criminal jurisdiction over non Indians, *see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978), or authority to regulate activities of nonmembers which do not affect tribal welfare and self-government unless the nonmembers have entered into consensual relations with the Tribe, *see Montana v. United States*, 450 U.S. 544, 563-67 (1981).

§ 1151(c); *see also, Alaska v. Native Village of Venetie*, 118 S. Ct. 948, 953 (1998).

The parties agree that the Tribe has jurisdiction over allotted lands still held in trust by the federal government. The State, the District, and the individual state and county officials assert, however, that this jurisdiction falls under § 1151(c) and that no other lands within the original 1858 boundaries have retained their status as Indian country under § 1151(a) because the reservation has been completely disestablished. The Tribe and the United States argue that the district court correctly ruled that the original exterior reservation boundaries retain effect and that all nonceded land within those boundaries constitutes the Yankton Sioux Reservation.

II.

A.

The heart of the matter involves whether Congress intended to disestablish the Yankton Sioux Reservation when on August 15, 1894 it finally ratified the 1892 agreement ceding certain tribal lands to the United States, *see* 28 Stat. at 314-20, or if not, whether it intended to diminish the reservation beyond the ceded lands. The 1892 agreement was the product of protracted negotiations between twenty four tribal representatives and the members of the Yankton Indian Commission (the Commissioners) who were appointed to procure the sale of the unallotted lands. The negotiations took place through a series of councils held from October through December of

1892. Although the immediate objective of the negotiations was the purchase of the unallotted lands, the Commissioners viewed this purchase as a step in the larger process of encouraging complete assimilation.

Commissioner Cole outlined the Commission's mission to the tribal representatives at the first council meeting. He explained that "The Great White father has sent us here to treat with you. He wants to give you a chance to sell your surplus lands. . . . He does not want you to sell your homes that he has allotted to you. He wants you to keep your homes forever." Council of the Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. 27, 53d Cong., 2d Sess., at 49. Later in the negotiations, Commissioner Cole also encouraged the Tribe to adapt to western influences. He argued that the Tribe had no choice but to sell the unallotted lands, declaring: "The tide of civilization is as resistless as the tide of the ocean, and you have no choice but to accept it and live according to its methods or be destroyed by it. To accept it requires the sale of these surplus lands and the opening of this reservation to white settlement." Council of the Yankton Indians (Dec. 17, 1892), transcribed in S. Exec. Doc. No. 27, at 81.

The Tribe proved reluctant to accept the offer to purchase its surplus lands. The Commission's reports show its work was made difficult by the Indians' distrust of the federal government and by factional divisions within the Tribe. *See* Report of the Yankton Indian Commission (March 31, 1893), reprinted in S. Exec. Doc. No. 27, at 7-25 (hereinafter Report). Some tribal members favored the sale and focused their energies on obtaining the highest possible price for the land, while others

expressed strong opposition to any sale of tribal lands. *See id.* at 8-11. Key issues in the negotiations included the price to be paid for the lands, the payment of money due to individual Indians who had served as scouts for the United States, the continued payment of annuities pursuant to the 1858 Treaty, and the exclusion of alcohol from the ceded area. *See id.* at 12-21. As the Commission reported: "Careful inquiry into the conditions and requirements of these Indians soon revealed to us the fact that the purchase of the surplus land was but a small part of our mission and of minor importance to both the Indians and the Government, the provisions connected therewith for the future welfare of the Indians being of greater importance to them and to the Government than the sale of their surplus lands." *Id.* at 17.

In December of 1892, the Commission finally reached an agreement with the Tribe whereby it agreed in Articles I and II to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation" for $600,000. 28 Stat. at 314-15. Article VIII provided that the portions of the ceded land currently occupied by the United States for "agency, schools, and other purposes" would be reserved from sale to settlers. 28 Stat. at 316. Article XVIII stated that the agreement did not abrogate the Tribe's rights under the 1858 treaty, 28 Stat. at 318, but this language pertained only to the right to receive annuities, not to the reservation boundaries. *See Yankton*, 118 S. Ct. at 799. Several other sections of the

agreement are relevant to these appeals, but many are not.[8]

By 1893 the Commissioners had collected the signatures required to show endorsement of the agreement by a majority of the adult male members of the Tribe. Congressional action to ratify the agreement was delayed, however, by the need to investigate allegations of fraud in the procurement of signatures. Congress finally ratified the agreement on August 15, 1894, along with two other similar surplus land sale agreements. 28 Stat. at 314-20. The 1894 Act incorporated the entire 1892 agreement, appropriated necessary funds, prescribed a punishment for violating the liquor prohibition, and reserved some sections for common school purposes. *Id.*

B.

Our starting point in analyzing the 1894 Act is the Supreme Court's *Yankton* decision, which each side not

---

[8] Articles VII, IX-XVI, and XIX-XX have little bearing on the issues here. Article VII provided for gifts of gold pieces to tribal members. 28 Stat. at 316. Article IX allowed uncultivated allotted land to be leased. *Id.* Article X allowed religious societies to purchase ceded land on which they were operating. *Id.* at 316-17. Article XII provided that the money paid under the agreement was not subject to claims by creditors. *Id.* at 317. Article XIII fixed the status of mixed bloods. *Id.* Article XIV required the government to complete the allotment process as soon as possible. *Id.* Article XV settled the claims of the Yankton scouts who had not been paid for their services. *Id.* Article XVI settled the Tribe's claim to the Pipestone Reservation. *Id.* at 317-18. Article XIX required a copy of the agreement to be placed in the Yankton "Agreement Book." *Id.* Article XX bound the parties upon ratification by Congress. *Id.*

surprisingly interprets in its own favor. The State asserts that *Yankton* provides an easy answer to the questions before the court because it shows that the reservation status of all land within the original boundaries has been lost. Because the Court relied on *DeCoteau*, 420 U.S. 425, for the proposition that certain language in the 1894 Act was precisely suited to terminating reservation status, and because *DeCoteau* had found the Lake Traverse Reservation completely disestablished, it necessarily follows that the 1894 Act similarly completely disestablished the Yankton Sioux Reservation. In contrast, the Tribe distinguishes *DeCoteau* and claims that *Yankton*'s holding of diminishment does not mean the reservation has been disestablished or its exterior boundaries changed.

Justice O'Connor, writing for the unanimous *Yankton* Court, articulated its precise holding as follows:

> In sum, we hold that Congress diminished the Yankton Sioux Reservation in the 1894 Act, that the unallotted tracts [which were ceded to the United States through that Act] no longer constitute Indian country, and thus that the State has primary jurisdiction over the waste site and other lands ceded under the Act.

Yankton, 118 S. Ct. at 805. The Court explicitly declined to decide whether or not the 1894 Act altered the status of the nonceded lands. As Justice O'Connor explained, "[w]e need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly decline to do so." *Id.* Whether or not other land within the original reservation boundaries retained its reservation status thus remained an open question.

Although the Court used *DeCoteau* in reaching its conclusion of diminishment, the *Yankton* holding was explicitly more limited than that in the earlier case. In *DeCoteau*, the Supreme Court analyzed the circumstances surrounding the ratification and the text of an agreement ceding certain lands on the Lake Traverse Reservation to the United States and held that the reservation there had been completely disestablished. *DeCoteau*, 420 U.S. at 427. The background of the Lake Traverse agreement was very different from that of the 1894 Act, however, because the tribal members there had expressed their clear desire to terminate their reservation. *See DeCoteau*, 420 U.S. at 432. In exchange they negotiated allotments for each individual, including married women. *See Act of March 3, 1891*, ch. 543, 26 Stat. 989, 1037-38. The circumstances surrounding the negotiation of the 1892 agreement with the Yankton Sioux and the difficulty in obtaining tribal votes to ratify it are significantly different, and there was no expression by the Indians of an intent to eliminate their reservation. Even more important, the content and wording of the agreements are very different, aside from the particular cession language the Supreme Court compared in *Yankton*. *Compare* 26 Stat. 1036-38, *with* 28 Stat. 314-18.

It is well established that similar treaty language does not necessarily have the same effect when dealing with separate agreements. Justice O'Connor writing for the Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 119 S. Ct. 1187, 1203 (1999), warned against reaching this conclusion.

> The . . . argument that similar language in two Treaties involving different partes [sic] has precisely the same meaning reveals a fundamental

> misunderstanding of basic principles of treaty construction. . . . Th[e] review of history and the negotiations of the agreement is central to the interpretation of treaties.

Context has been found to play a similarly important role in interpreting the language of the surplus land acts.[9] *See Solem v. Bartlett*, 465 U.S. 463, 469 (1984). The Commissioners negotiating on behalf of the United States told the Yankton tribal representatives that "[The Great White Father] wants you to keep your homes forever. He only wants you to sell your surplus lands for which you have no use." Council of the Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. 27, 53d Cong., 2d Sess., at 49. In light of the significant contextual differences, we cannot assume that the Court's citation to *DeCoteau* means that that case controls the issues raised here.

The *Yankton* Court did make a number of explicit references to the status of the reservation boundaries. The Court found the 1894 Act distinguishable from those acts which it "has interpreted as maintaining reservation boundaries." *Yankton*, 118 S. Ct. at 799. The question before it was described as whether the 1894 Act "diminished the boundaries" of the reservation. *Id.* at 793. The

---

[9] Although in 1871, Congress terminated treaty making with Indian tribes, the United States continued to negotiate agreements with them in much the same manner as it had negotiated treaties. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 127-28 (1982 ed.). The 1892 agreement itself was also sometimes referred to as a "treaty." *See, e.g.*, S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 48 (statement of Commissioner Cole to tribal negotiations); 1894 Commissioner Letter at 5 (letter from Commissioner of Indian Affairs referred to the Secretary of the Interior).

Court distinguished situations in which states acquired primary jurisdiction over opened lands and "thereby diminished the reservation boundaries" from those in which the entire opened area remained Indian country even though non Indians were able to purchase land. *Id.* at 797-98 (citations omitted). In the Commission reports it found evidence that the 1894 Act involved alteration of "the reservation's character" and "a reconception of the reservation." *Id.* at 802. Some of the language was "reminiscent" of that used for the diminished Unitah reservation. *Id.* ("Congress would 'pull up the nails' holding down the outside boundary" of the reservation) (citation omitted). The Court went on to hold that the savings clause of Article XVIII "pertains to the continuance of annuities, *not the 1858 borders.*" *Id.* at 800 (emphasis added). These references indicate the Court's understanding that the 1858 reservation boundaries did not remain intact following passage of the 1894 Act.

The Tribe is able to identify only one reservation which apparently continues to have its original boundaries even though some of the land within the boundaries has lost its reservation status – the Unitah Valley Reservation. The peculiar procedural history of the litigation involving that reservation does not suggest that it is precedent for maintenance of the original exterior borders of the Yankton Sioux Reservation. Long after the Tenth Circuit held that the Unitah Valley Reservation had been neither disestablished nor diminished, *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), the Supreme Court decided in a different case that the reservation had been diminished, *Hagen v. Utah*, 510 U.S. 399 (1994). The Tenth Circuit then modified its *Ute* decision to

the extent it was in direct conflict with *Hagen*, holding that the ceded lands did not retain reservation status, but it did not change its position regarding the status of the other lands within the original reservation boundaries. *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1520 (10th Cir. 1997). The Tenth Circuit indicated that the reason it went no further in its 1997 decision was because of concern for finality in light of years of reliance on its earlier holding. *See id.* at 1524, 1527.

Based on our interpretation of what the Court said in *Yankton*, the lack of controlling precedent to suggest the original reservation boundaries can be maintained despite the extent of the diminishment, and the record before the court which we discuss below, we conclude that the original exterior boundaries of the Yankton Sioux Reservation do not serve to separate Indian country from areas under primary State jurisdiction.

C.

Congressional intent is the touchstone for analyzing whether the 1894 Act altered the status of the nonceded lands. *See Rosebud Sioux Tribe*, 430 U.S. at 586. After land is set aside for an Indian reservation, it retains that status until Congress explicitly indicates otherwise. *See Solem*, 465 U.S. at 470. Intent to diminish or disestablish a reservation must be "clear and plain." *United States v. Dion*, 476 U.S. 734, 738 (1986). Such intent must be "expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505 (1973). Whether Congress intended to

disestablish the reservation completely, or whether it intended all or some of the nonceded land to retain its reservation status is complicated by the fact that modern distinctions between different categories of Indian country were not recognized by nineteenth century legislators who had a different understanding of the requirements for land to be classified as reservation land and/or Indian country.

As mentioned earlier, three different categories of land currently qualify as Indian country:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. This definition of Indian country was codified in 1948, and its key provisions have remained unchanged since that time. The State places great emphasis on the distinction this definition makes between land that is Indian country because it is part of a reservation, § 1151(a), and land which qualifies as Indian country under § 1151(c) because of its allotment status. An Indian allotment may be either a parcel held in trust by the federal government for the benefit of an Indian (a trust allotment) or a parcel owned by an Indian subject to a restriction on alienation in favor of the United States (a

restricted allotment). *See United States v. Stands*, 105 F.3d 1565, 1571-72 (8th Cir. 1997). Under § 1151(c) both types of allotments are Indian country regardless of whether they are on or off an Indian reservation. 18 U.S.C. § 1151(c); *see also Alaska v. Native Village of Venetie*, 118 S. Ct. 948, 953 (1998). In contrast, lands that are owned in fee without such restrictions on alienation do not qualify as Indian country under § 1151(c); but they may be classified as Indian country under § 1151(a) if they are within the boundaries of an Indian reservation. *See Stands*, 105 F.3d at 1572.

The parties all agree that lands originally allotted to individual tribal members that are still held in trust by the United States are Indian country within the meaning of § 1151(c), but they dispute whether the Yankton Sioux reservation still exists and whether any nonceded lands fit the current understanding of Indian country in § 1151(a). The State argues that although Congress intended some lands to retain their status as Indian country because of their status as allotments, it did not intend to maintain any reservation. The Tribe, on the other hand argues that the 1894 Act only altered the status of the ceded lands and that the reservation status of all other lands within the original 1858 boundaries was not changed.

Members of Congress in 1894 operated on a set of assumptions which are in tension with the modern definitions of Indian country, and the intentions of that Congress and of the 1892 negotiating parties are what we must look to here. At the turn of the century, Indian lands were defined to include "only those lands in which the Indians held some form of property interest: trust lands;

individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians." *Solem*, 465 U.S. at 468. Lands to which the Indians did not have any property rights were never considered Indian country. The notion of a reservation as a piece of land, all of which is Indian country regardless of who owns it, would have thus been quite foreign. Congress in the late nineteenth century was operating on the assumption that reservations would soon cease to exist, *see id*, and on the belief that allotting lands, and purchasing those left unallotted, were steps in the process of eventually dismantling the reservation system. *See United States v. Southern Pacific Transp. Co.*, 543 F.2d 676, 695 (9th Cir. 1976). The 1894 Congress would have felt little pressure to specify how far a given act went toward diminishing a reservation and would have had no reason to distinguish between reservation land and other types of Indian country. *See id.*

With this background in mind, *see Yankton*, 118 S. Ct. at 798, we consider whether the 1894 Congress intended to eliminate the Yankton reservation entirely or whether it intended to maintain the reservation status of some or all of the nonceded land. We apply the standard rules of interpretation for surplus land act cases. Each act must be analyzed individually, its effect depending on the language used and the circumstances of its passage. *See Solem*, 465 U.S. at 469. The statutory language provides the most probative evidence of congressional intent. *See Rosebud Sioux Tribe*, 430 U.S. at 586. Also relevant are the legislative history of the act and its historical context, including events surrounding the statute's passage which shed light on the contemporaneous understanding of it.

See Hagen v. Utah, 510 U.S. 399, 411 (1994). Treaties with Indians are also interpreted to give effect to the terms as the Indians themselves would have understood them. *See Mille Lacs Band of Chippewa Indians*, 119 S. Ct. at 1200. To a lesser extent, the subsequent treatment of the area is also relevant. *See Yankton*, 118 S. Ct. at 798. Under certain circumstances the "justifiable expectations" of the parties are considered, *see Rosebud Sioux Tribe*, 430 U.S. at 605, as well as changes in the demographics of the area, *see Hagen*, 510 U.S. at 411 All ambiguities are resolved in favor of the Indians, and neither diminishment nor disestablishment will be found lightly. *See Yankton*, 118 S. Ct. at 798; *Hagen*, 510 U.S. at 411.

The primary purpose of the 1892 agreement, which was ratified by the 1894 Act, was to cede the unallotted surplus lands on the Yankton Sioux Reservation to the United States. The specific language accomplishing this goal is found in Articles I and II of the agreement. Article I states that the Tribe agrees to "cede, sell, relinquish, and convey to the United States all their [sic] claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation." 28 Stat. at 314. Article II provides that the United States agrees to pay the Tribe $600,000 "in consideration for the lands ceded, sold, relinquished, and conveyed to the United States." *Id.* at 315. The text of these articles refers explicitly only to the ceded lands.

The State argues that the cession of these lands necessarily terminated the reservation status of all lands within the original 1858 boundaries. It contends that allotments were intended to be temporary in nature and

cannot alone constitute a reservation. It believes the failure of the Tribe to retain ownership in common of land for itself means that the reservation was disestablished. The State asserts that uncertainty about whether the Tribe owned land in common in 1894 was the key point which kept the *Yankton* Court from finding the reservation disestablished. Now that it has produced evidence to resolve that question in its favor and the district court has found that the Tribe did not reserve any lands in 1892 to be held in common, *see Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d at 1154, the reservation must be found disestablished. We cannot agree that the Supreme Court expected this point alone to be dispositive, however, for it said that among the factors causing it to limit its holding was "the fact that the Tribe *continues* to own land in common." *Yankton*, 118 S. Ct. at 805 (emphasis added), an apparent reference to the Tribe's current landholdings.

The State also relies heavily on what it views as the background understanding of the 1894 Congress to support its conclusion that cession of all land held in common by the Tribe necessarily terminated the reservation status of everything within the original 1858 boundaries. It cites the comment in *Yankton* that around the turn of the century " '[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar.' " *Id.* at 798 (quoting *Solem*, 465 U.S. at 468). It is important to keep in mind that it is not clear that the reference in *Solem* to "tribal ownership" meant ownership of land in common by the Tribe, as opposed to

ownership by a tribal member.[10] In any event Indian tribes did not hold ownership rights to land, but rather rights to exclusive use and occupancy of land. *See Spalding v. Chandler*, 160 U.S. 394, 403 (1896). Although the background understanding of the 1894 Congress "informs our inquiry," *id.*, courts have not been willing to extrapolate from general legislative assumptions and expectations of the late nineteenth century to find in each surplus land act a specific congressional purpose to remove all lands not under Indian control from reservation status. *See Solem*, 465 U.S. at 468-69. If Congress' general understanding that tribal ownership was a necessary component of reservation status controlled, all land which passed out of tribal ownership would necessarily be found to have lost its reservation status – a conclusion the Supreme Court has explicitly refused to adopt. *Id.*

More persuasive arguments regarding the interpretation of Articles I and II are drawn from evidence which

---

[10] A careful reading of the relevant passage in *Solem* suggests that the Court used the terms "reservation lands" and "Indian lands" interchangeably to refer to all lands in which Indians had a property interest when it was discussing the assumptions of Congress in the early nineteenth century. *Solem* contrasted lands that "retained reservation status" from those that were "divested of all Indian interests," and the Court appeared to use both the words "reservation lands" and "Indian lands" to refer to lands that retained their reservation status. *Solem*, 465 U.S. at 468. "Indian lands" included: "[o]nly those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians." *Id.* Finally, the Court specifically pointed out that "only in 1948 did Congress uncouple reservation status from *Indian ownership*." *Id.* (emphasis added).

places the Act in its full historical context and sheds light on the parties' contemporaneous understanding of the impact of the cession. The State argues that this evidence shows that the " 'cession' and 'sum certain' language" in Articles I and II, *see Yankton*, 118 S. Ct. at 798 (citation omitted), was intended to terminate the reservation status of all lands within the original reservation boundaries. The Tribe argues that these same documents establish that the parties understood that these articles would only terminate the reservation status of the ceded lands.

The Commissioners who negotiated the agreement on behalf of the United States retained detailed records of the councils held to negotiate the sale of the unallotted lands and prepared an extensive report which was submitted to Congress along with the agreement. *See* S. Exec. Doc. No. 27, 53d Cong., 2d Sess. (1894). Two key points can be discerned from these records. First, the Commissioners indicated to the tribal representatives that their primary objective was the purchase of the *unallotted* lands. Second, the Commissioners emphasized to the tribal representatives that tribal members needed to move into the modern, post tribal era and that the sale of the unallotted lands would constitute one step toward that ultimate goal. *See id.*

The Commissioners repeatedly emphasized that they had one primary purpose. Commissioner Adams, for example, introduced the Commission's purpose, stating that "we . . . understand that you own, outside your allotments, a large quantity of land in common. It is this land that you own in common that we were appointed by the Great Father to talk to you about." Council of the

Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. 27, 53d Cong., 2d Sess , at 48. They also indicated that the tribal leadership would retain some governing powers, suggesting for example, that: "It might be, after you sold your lands, you could have this reservation organized as a separate county. If this could be done – I do not say it can – you could govern your own people in your own way, so long as you obeyed the laws of the State." *Id.* The Yankton Sioux could have interpreted such comments to indicate that their powers of self government, which at that time were limited to lands in which Indians had a property interest, would not be further limited and that the cession of the unallotted lands would not alter the Tribe's control over the lands retained by the Indians. Although the Commissioners were careful not to make promises concerning the scope of tribal self government powers, the references to a continuing tribal government suggest the parties did not intend to disestablish the reservation.

The Commissioners' introductory remarks, however, also emphasized that the tribal members needed to adapt to the modern era and urged them to allow settlers on the then unallotted lands so that they could learn from the white man how to farm, conduct business, and be citizens. *Id.* In line with the assumption that the reservation system would soon be outmoded, Commissioner Cole admonished:

> In your old life the tribal condition was a necessity. It united you and protected you and made you strong. But you are now living under new conditions and you must drop your old forms which are not suited to these conditions

> and take up new forms suited to your new mode of life. The Government seeing this sent an allotting agent to you to help you divide you [sic] land and select your homes. . . .
>
> Now that you have your homes and that your allotted lands are more than you can make use of, you have sent word to Secretary Noble that you desire to sell your surplus lands and get money to help you to improve your farms and build good houses and buy stock. The Great Father and his Great Secretary . . . have sent us here to buy [the] surplus lands for homes for white men who will settle among you; who will live peaceably and neighborly with you; who will cultivate these surplus lands and make your allotted lands more valuable.

Id. at 50. At the time the cession agreement was negotiated, the allotment process was not even complete; many allotments remained to be finalized. *See* 1894 Commissioner Letter at 5. The concept of individual property ownership was new to the Indians, and although it was hoped allotment would stimulate individual effort to improve the land, there is little indication that this concept had taken root. *See* Report of the Yankton Indian Commission (Mar. 31, 1893), reprinted in S. Exec. Doc. No. 27, at 7, 14-16 (1893 Report). The Indians thus could easily have understood these statements to mean that the status of the lands that had been allotted to them would not be changed by the agreement, and that they would retain control over these lands as in the past.

The Commission's report to Congress highlights its hope that assimilation would be promoted by the allotment of reservation lands and the cession of those that

remained unallotted, but the report also suggests the parties recognized a division between unallotted and ceded lands. The Commission indicated that "now that [the members of the tribe] have been allotted their lands in severalty and have sold their surplus land – the last property bond which assisted to hold them together in their tribal interest and estate – their tribal interests may be considered a thing of the past." Report of the Yankton Indian Commission (Mar. 31, 1893), reprinted in S. Exec. Doc. No. 27, at 7, 19 (hereinafter Report). The Supreme Court found this language supported its conclusion that the 1894 agreement divested the Tribe of jurisdiction over the ceded lands. *Yankton*, 118 S. Ct. at 803.

This same report also indicates, however, that the ceded and nonceded lands would be treated differently, at least for as long as the Indians retained property in common, suggesting that the divestiture of jurisdiction was not complete. In explaining to Congress why they had such difficulty negotiating a price for the land, the Commissioners explained.

> On the matter of price we encountered much difficulty. Two important factors in determining the value of these lands seem to have been wholly overlooked by both the Indians and their friends: First, That the Indians were not selling their whole reservation, but less than two-fifths of it, and that more than three-fifths of it would remain in their possession for such cultivation and improvement as Indians will give to it, and free from taxation for twenty five years; second, that the surplus lands are not in one body, but scattered over the reservation and mixed up with the allotted lands of the Indians. We think

> the value of these surplus lands per acre would be doubled if the whole reservation were being disposed of by the Indians, to be equally improved by white people and uniformly taxed.

1893 Report at 13. This report is evidence of the parties' understanding that only a portion of the reservation was being separated at that time, and also suggests that the negotiations were complicated by the Indians' differing conception of land use and property ownership.

The Commission's reports do not describe any reservation boundaries or mention any transfer of the Yanktons' tribal sovereignty. *See Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d 1135, 1148 (D.S.D. 1998). Instead, these reports show only that the Commissioners emphasized the need for the Indians eventually to become completely assimilated into the "modern era" and encouraged them to sell their surplus lands to aid in this process. Although the sale of the surplus lands was characterized as a step required by changes of the modern era, it was not directly equated with the loss of control over other lands. In sum, the plain language of the text of Articles I and II only refers to the ceded lands, and the reports of the Commission do not indicate the "clear and plain" congressional intent required to show the reservation status of all non-ceded lands was terminated by this Act. The evidence is thus insufficient to establish that the "cession and sum certain" language of Articles I and II was intended to disestablish the reservation.

There are other provisions of the agreement which may shed light on the intended impact on unallotted lands. The State directs our attention to Articles III-VI

and XI, which established a complex system for the payment of the purchase price of $600,000. 28 Stat. 315-17. It points out that some aspects of the payment plan were linked to the twenty five year trust period and argues that this shows that such lands retained their Indian country status because the Indian title to the allotments had not yet been extinguished. The Tribe, on the other hand, argues that the provision allowing for the Act's creation of a fund to support schools, courts, and other tribal institutions evidences congressional intent to preserve tribal self government within the 1858 boundaries and to maintain reservation status for the allotted lands.

According to the agreement for payment, $100,000 was to be divided among the members of the tribe per capita, and $500,000 was to be placed into an interest bearing account for the benefit of the Tribe. Article V provided that interest from that account could be used to set up a fund to meet basic needs of the tribal members, or it would be distributed on a per capita basis to tribal members. 28 Stat. at 315. After the trust period expired on the allotted lands, any monies remaining in the original account or in the fund were to be disposed of by the Secretary of the Interior for the benefit of the Tribe. Arts. IV, V, 28 Stat. at 315. Article IX provided that the allotted land of any tribal members who died without heirs within twenty five years was to be sold and the proceeds added to the fund provided for in Article V. 28 Stat. at 315-17.

The Tribe places great emphasis on Article V because it specifically provided that some of the interest due on payment funds might be set aside and used "for the care and maintenance of such orphans, and aged, infirm, or

other helpless persons of the Yankton tribe of Sioux Indians . . . ; for schools and educational purpose for the said tribe; and for courts of justice and other local institutions for the benefit of said tribe." 28 Stat. at 315. Institutions that might have qualified for such monies included the Indian police force and the Court of Indian Offenses, both of which the district court found still operative at the time of ratification. *See Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d, at 1150. It is undisputed that this optional fund was never actually created, but the fact that it was provided for in the statute has relevance on the question of intent. Article V clearly foresaw continued tribal activity in providing for the needs of the Yankton Sioux in terms of education, justice, and "other local institutions." Nevertheless, section 2 of the article also contemplated a future in which such a fund would not be needed when the Indians might receive "complete title to their allotted lands and . . . assume[ ] all duties and responsibilities of citizenship." 28 Stat. at 315.

The prohibitions on the sale of alcohol found in Article XVII provide further insight into the parties' intent. This article provides that "no intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians." 28 Stat. at 318. The Supreme Court found this provision indicated that the parties intended to diminish the reservation by the Act of 1894, reasoning that the language would have been superfluous if all lands were to retain their reservation status. *See Yankton*, 118 S. Ct. at 801. The language would also have been superfluous if

the parties had intended to disestablish the Yankton Sioux Reservation. The Court found it significant that the provision "signal[ed] a jurisdictional distinction between reservation and ceded land. *Id.*" In this article the parties acknowledged the continued existence of two distinct categories of land to which different laws might apply.

Article VIII, the "agency lands provision," provides strong evidence that a reservation was expected to remain in existence. This provision provides that "[s]uch part of the surplus lands hereby ceded and sold to the United States, as may now be occupied by the United States for agency, schools, and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes." 28 Stat. at 316. As the Supreme Court noted, this provision "counsels against finding the reservation terminated." *Yankton*, 118 S. Ct. at 801. The Court cited its prior interpretation of virtually identical language in *Solem* where it reasoned that it would be " 'difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation.' " *Yankton*, 118 S.Ct. at 801 (citing *Solem*, 465 U.S. at 474). Congress' expectation that the federal government would continue to have a significant presence in the area for the welfare of the Tribe indicates that some lands were expected to remain outside of primary state jurisdiction.

The State argues that the retention of this land is irrelevant to our analysis because the provision does not specify that such reserved land remained in reservation status, and the federal government's continuing obligations were based on the fact that Indian allottees held

patents for their land in trust. Nothing in Article VIII specifically ties the government's retention of these lands to the trust period, however, or indicates that its obligations were expected to end when the trust period expired. Instead, the Article says that the lands would be retained "until they are no longer required for such purposes." 28 Stat. at 316. And in 1929 the lands were returned to the tribe for common purposes. Act of February 13, 1929, ch. 183, 45 Stat. 1167 (explicitly providing that the lands could not be allotted).

Neither the text of the 1894 Act nor evidence of the parties' contemporaneous understandings clearly establish an intent to disestablish the Yankton Sioux Reservation. The reports indicate that the Commissioners' statements may have sent mixed messages to the Indians in that they sometimes talked about continuing tribal control over land and sometimes suggested that the property bonds of the Indians would be severed. The Indian understanding of land use and control differed from the European American notion of individual property ownership and the Commissioners mixed messages could have led the Yankton Sioux to believe that their control over the lands retained in trust for individual members would remain unchanged. *See* Felix Cohen, *Handbook of Federal Indian Law* 131-32 (1982 ed.); *see also* Michael L. Ferch, Indian Land Rights, 2 *Transnat'l L. & Contemp. Probs.* 301 (1992) (comparing the Indian view of property rights with the western view).

The Act could not foresee all that would happen in the future with population movement, state development, and changing Indian policy, but it contained provisions showing concern for future interests of the Indians in

common, as well as provisions recognizing that conditions were sure to change as white settlers moved in to the opened reservation with the expectation of state support. In the Act, the federal government reserved land to provide for tribal needs in Article VIII, and the parties recognized a distinction between ceded and reservation lands in Article XVII. The Act did not leave all land within the original exterior reservation boundaries under tribal control, *see Yankton*, 118 S. Ct. at 805, or define new reservation boundaries, and nothing in its text or the circumstances surrounding its passage suggests that any party anticipated that the Tribe would exercise jurisdiction over non Indians who purchased land after it lost its trust status. Some articles of the Act reflect the parties' assumption that an allottee who received full title at the end of the trust period would become subject to the civil and criminal laws of the State or territory in which he resided. 24 Stat. at 389-90. Article V indicates that the fund which could be established to provide for helpless and infirm tribal members would no longer be needed "[w]hen the Yankton tribe of Sioux Indians shall have received from the United States a complete title to their allotted lands and shall have assumed all the duties and responsibilities of citizenship." 28 Stat. at 315. Congress also added the so-called "school sections clause" to the Act which parallels language in the South Dakota enabling act, Act of Feb. 22, 1889, 25 Stat. 679, and provided that certain sections of the ceded land would be reserved for common schools, 28 Stat. at 319. This suggests that as more white settlers came on to the opened lands, increased state involvement on their behalf was

expected, and the jurisdiction of the State was expected to increase over time.

In sum, the 1894 Act did not clearly disestablish the Yankton Sioux Reservation, but it intended to diminish the reservation by not only the ceded land, but also by the land which it foresaw would pass into the hands of the white settlers and homesteaders. The text of the 1894 Act, read in its full historical context, establishes that the intent was to cede certain lands to the United States and to open areas of the Yankton Sioux Reservation to white settlers, as well as to reserve land to be used to care for continued tribal interests. Until the Indian allottees would receive their lands in fee and the trust period over them would end, they could not convey land to non Indians. It was then foreseen that the trust period over the allotments would at some point come to an end, but we note that some of this allotted land apparently remains in trust to this very day.

D.

The treatment of the Yankton area in the years following the passage of the Act provides further evidence that the nonceded lands retained their reservation status until they passed out of trust. Although evidence regarding the subsequent treatment of the area cannot control when there is strong textual and contemporaneous evidence regarding the status of the land in question, *Yankton*, 118 S. Ct. at 804, courts have consistently recognized that events occurring after the passage of a surplus land act may shed light on the contemporaneous understanding of the act, *see Solem*, 465 U.S. at 4701; *see also Hagen*,

510 U.S. at 411. Established jurisdictional patterns may also over time lead to the development of justifiable expectations which the Supreme Court has found worthy of consideration. *Rosebud Sioux Tribe*, 430 U.S. at 604-05.

Congress took a definitive and considered step when it decided to return title to the Yankton Sioux Tribe for the lands that had been reserved for federal use in the 1894 Act. *See* Act of February 13, 1929, ch. 183, 45 Stat. 1167.[11] Congress not only returned the land to the Tribe, but also specifically provided that the land would not become available for allotment purposes. *Id.* Although "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *Yankton*, 118 S. Ct. at 803, the return of these lands to tribal control suggests that the reserved lands were always intended to provide a property site for organized efforts to provide aid and education to tribal members so long as they were needed. This action indicates that at the close of the era,

---

[11] References cited by the parties to administrative documents and maps, which either refer to the Yankton Sioux Reservation or lack any such reference, were found by the Supreme Court to have "limited interpretive value." *Yankton*, 118 S. Ct. at 803-04. The use of the term "Yankton Sioux Reservation" in such documents, without more, cannot be said to be a considered jurisdictional statement regarding the specific status of the remaining Indian lands. Moreover, problems associated with relying on the presence or absence of a cite on a map is illustrated by the failure of a prestigious map maker to include the states of North Dakota, South Dakota, Oklahoma and parts of Minnesota, Iowa, and Kansas in one world atlas. *See* Richard J. Margolis, "How the West Was Lost," *The New Leader*, p. 13 (Nov. 27, 1989) (discussing the omission of these states from Rand McNally's 1989 *Photographic World Atlas*).

the United States government understood, as it continues to argue today, that the Yankton Sioux reservation was not completely disestablished in 1894.

Longstanding divisions of jurisdictional authority have also been entitled to considerable weight in similar boundary disputes. *See Rosebud Sioux Tribe*, 430 U.S. at 605 n.28. The State has presented uncontroverted evidence showing that the State has assumed primary jurisdiction over unallotted lands that have passed out of trust status. The Tribe has not established reason to doubt the veracity of the various letters and reports of several Superintendents of the Yankton Agency and Commissioners of Indian Affairs which indicate that the federal government only exercised jurisdiction over allotted lands held in trust and the agency reserve. In addition, three former United States Attorneys for the District of South Dakota testified that during their tenures, which collectively cover most of the years between 1965 and 1991, the federal government continued to exercise jurisdiction only over those lands actually held in trust. The Tribe has presented evidence indicating that it maintained a tribal police force and an independent judicial system following the passage of the 1894 Act.[12] It has also presented evidence suggesting that the State did not always allocate sufficient resources to enforce its laws consistently within

---

[12] The Tribe's position on this evidence is not contested. A court of Indian offenses was in existence at the time of the treaty in 1894. Although it was abolished in 1909, its duties were taken over by the Superintendent until it was reinstated in 1943. The court was replaced in 1945 with the Yankton Sioux Tribal Court, but there is no evidence that this court ever exercised jurisdiction over lands owned by non-Indians.

the original reservation boundaries. While this evidence may show problems of enforcement, it does not prove that the Tribe or the federal government exercised jurisdiction over the whole area. On the record before the court, the Tribe has not presented any new evidence to undermine the Supreme Court's statement that the Tribe has not asserted civil, regulatory, or criminal jurisdiction over lands other than those held in trust, *Yankton*, 118 S. Ct. at 804, and "the longstanding assumption of jurisdiction by the State over [a predominately non-Indian area creates] justifiable expectations which should not be upset by [a] strained . . . reading of the Acts of Congress," *Rosebud Sioux Tribe*, 430 U.S. at 604-05.

III.

In 1858 Congress designated the Yankton Sioux Reservation as an area set aside for the exclusive use of the Yankton Sioux Tribe. The status of the lands which initially comprised this reservation were later altered when the federal government allotted lands previously held in common by the Tribe to individual Indians and then purchased the remaining unallotted lands to open them up for homesteading. In *Yankton*, the Supreme Court held that the cession of the unallotted lands in 1894 removed these lands from the reservation and indicated that the 1858 boundaries were not maintained. The text of the 1894 Act and evidence regarding the parties' contemporaneous understanding of it establish that the reservation was maintained, but do not define its precise boundaries. When viewed in its full historical context, however, it is clear that the parties did not intend for the tribe to retain

control over allotted lands which passed out of trust status and into non Indian hands.

For these reasons, we hold that the Yankton Sioux Reservation has not been disestablished, but that it has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands. These lands are not part of the Yankton Sioux Reservation and are no longer Indian country within the meaning of 18 U.S.C. § 1151. We recognize that the original exterior treaty boundaries of the reservation have not been maintained. *See Yankton,* 118 S. Ct. at 799-800. We also assume that land now owned in fee by individual Indians is not under tribal jurisdiction unless it is found to be "within the limits of [the] Indian reservation." 18 U.S.C. § 1151(a). On the record before the court, however, we cannot define the precise limits of the reservation which remains.

The current amount of Indian trust land on the Yankton Sioux Reservation is unclear from the record. Since both sides have followed an all or nothing strategy (the State arguing disestablishment and the Tribe claiming maintenance of the 1858 boundaries), neither side spent much time developing the record on the specifics of this trust land. The South Dakota Supreme Court has said that the reservation was reduced by the 1894 Act "from a 410 square mile (430,495 acre) sanctuary down to what is presently scattered Indian holdings of approximately 40,000 acres." *South Dakota v. Greger,* 559 N.W. 2d 854, 859 (1997). It also stated that in modern times both Indians and non Indians refer to the reservation "as a 'mile square' " *id.,* in reference "to the tribal headquarters area at Marty," *id.* at 859 n.4. The Supreme Court later stated

in *Yankton* that currently less than ten percent of the 1858 reservation lands remains "in Indian hands," 118 S. Ct. at 804, and that within the original exterior reservation boundaries, there are only 30,000 acres held in trust for individual Indians, and 6,000 acres of "tribal lands," *id.* at 796.

References in the briefs in these cases and in judicial opinions are not always clear about what is meant by trust land. The term is variously used to include 1) the land reserved to the federal government in the 1894 Act and later returned to the Yankton Tribe, 2) land allotted to individual Indians that remains held in trust, and 3) land taken into trust under the Indian Reorganization Act of 1934. Efforts at oral argument to get precise statements from the parties identifying what trust land remains were unsuccessful. At this time we hold only that the land reserved to the federal government in the 1894 Act and then returned to the Tribe continues to be a reservation under § 1151(a), and we leave it to the district court on remand to make any necessary findings relative to the status of Indian lands which are held in trust.

The judgments of the district court are affirmed in so far as the court concluded that the Yankton Sioux Reservation has not been clearly disestablished, but the judgments are reversed in so far as the court concluded that the 1858 exterior reservation boundaries remain intact and that all nonceded lands remain part of the reservation. The permanent injunctions entered by the district court are vacated, and the cases are remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

YANKTON SIOUX TRIBE, and its individual members, Plaintiffs, UNITED STATES OF AMERICA, on its own behalf and for the benefit of the Yankton Sioux Tribe, Plaintiff-Intervenor, -vs- MATT GAFFEY, States Attorney of Charles Mix County; HERMAN PETERS, BRUCE BAKKEN, and JACK SOULEK, Members of the Charles Mix, South Dakota, County Commission; WILLIAM JANKLOW, Governor of South Dakota; and MARK BARNETT, Attorney General of South Dakota, Defendants,	CIV 98-4042 MEMORANDUM OPINION AND ORDER (Filed August 14, 1998)

The YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members, and DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,	*	CIV 94-4217
Plaintiffs,	*	
-vs-	*	
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a non-profit corporation,	*	
Defendant.	*	
**********		
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT,	*	
Third-Party Plaintiff,	*	
-vs-	*	
STATE OF SOUTH DAKOTA,	*	
Third-Party Defendant.	*	
**********		

In *South Dakota v. Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), the United States Supreme Court held that the 1894 Act of Congress ratifying the 1892 Agreement with the Yankton Sioux Tribe for the sale of surplus tribal lands terminated the reservation status of those unallotted, ceded lands, resulting in the diminishment of the Yankton Sioux Reservation. The Supreme Court reached this decision with full acknowledgment that the "context of the [1894] Act is not so

compelling that, standing alone, it would indicate diminishment[.]" *Id.* at 802. Rather, the Supreme Court relied upon the surrounding circumstances of the Act to conclude that Congress intended to diminish the reservation. The issue remaining for decision in these cases consolidated following the Supreme Court's remand is whether the 1894 Act of Congress disestablished the Yankton Sioux Reservation.

Although the parties to this litigation have at times used the terms "diminishment" and "disestablishment" interchangeably, the Court in this opinion uses each word to convey a particular meaning. As noted by the United States Court of Appeals for the Eighth Circuit in its vacated opinion, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439, 1443 n.4 (8th Cir. 1996), the term "disestablishment" is "more precisely used to describe the relatively rare elimination of a reservation, *see e.g., DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), as opposed to reduction in the size of a reservation or 'diminishment.' *See, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977)." The Supreme Court carefully stated in *Yankton Sioux Tribe*, ___ U.S. at ___ 118 S.Ct. at 805, that its holding was limited to the narrow question of whether the 1894 Act diminished – that is, reduced the size of – the Yankton Sioux Reservation. As in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), the Supreme Court declined to "determine whether Congress disestablished the [Yankton Sioux] reservation altogether[.]" *Yankton Sioux Tribe*, ___ U.S. at ___ 118 S.Ct. at 805.

The Court now answers the question left open by the Supreme Court and, for the reasons explained thoroughly below, holds that the 1894 Act of Congress ratifying the cession and sale of surplus tribal lands did not disestablish the Yankton Sioux Reservation. The 1894 Act of Congress was not one of those "relatively rare" pieces of legislation that resulted in the elimination of a reservation. Rather, by ratifying the 1892 Agreement with the Yankton Sioux Tribe, Congress, in the words of the Supreme Court, modified or reconceptualized the Yankton Sioux Reservation. *See Yankton Sioux Tribe*, ___ U.S. at ___, ___, 118 S.Ct. at 798, 802. The Yankton Sioux Reservation, as diminished by the 1894 Act, encompasses all of the reservation lands that were allotted pursuant to the allotment acts, as well as the lands reserved from sale for agency, school, and other tribal purposes, within the original exterior reservation boundaries established by the 1858 Treaty with the Yankton Sioux Tribe.

Federal law defines "Indian country" as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151. The Yankton Sioux Reservation, as described above, is "Indian country" within the meaning of the federal statute.

I. Treaties and the End of Treaty-Making With the Yankton Sioux

The Yanktons belong to one of fourteen tribes in the federation of Sioux, and included 32,000 people claiming

use rights to approximately 100 million acres of land upon the arrival of non-Indians during the 17th century. H. Hoover, *A Yankton Sioux Tribal Land History* at 2 (1995). (Pl. Ex. 31.) During the 18th century, when members of the federation spread by tribes and bands to occupy the historic Sioux Country, about two thousand Yanktons took up residence over the central portion between the Des Moines and Missouri Rivers, south of the present boundary that divides North and South Dakota. *Id.* By the early 19th century, the Yankton Sioux exclusively controlled over 13 million acres of land. *Id.* The United States government formally recognized the Yankton Sioux Tribe as a political entity when the first treaty was negotiated in 1815. H. Hoover, *A History of Yankton Tribal Governance* at 1 (1995). (Pl. Ex. 78.) The United States negotiated subsequent treaties with the Yankton Sioux in 1830, 1836, 1837, 1851, and 1858. *Id.*

"After some years of earnest effort on the part of the Interior Department to induce the Yanktons to cede a portion of their territory, finally, in the fall of 1857," a military captain, with the assistance of Charles T. Picotte, a Yankton half-blood, persuaded the Yanktons to send a delegation to Washington, D.C., to confer with the Government in the early part of the winter of 1857-58. Report Of The Commissioner of Indian Affairs at 423-24 (Oct. 1, 1891). (Gov't. Ex. 18.) In the resulting April 19, 1858 Treaty, 11 Stat. 743, (Pl. Ex. 1), the Yankton Sioux Tribe ceded and relinquished to the United States:

> all the lands now owned, possessed, or claimed by them, whereever [sic] situated, except four hundred thousand acres thereof, situated and described as follows, to wit – Beginning at the

> mouth of the Naw-izi-wa-koo-pah or Chouteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres.

The Yankton Sioux were to have exclusive occupation of the reservation lands, along with unrestricted use of the red pipestone quarry in the State of Minnesota. A land survey later conducted revealed that 430,495 acres were included in the land mass described by the 1858 Treaty and reserved to the Yankton Sioux. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 5 (1894). (Pl. Ex. 5.) The land comprising the 1858 Yankton Sioux Reservation is located in the central to southeastern portion of Charles Mix County, South Dakota.

In the 1858 Treaty, the Yankton Sioux relinquished and abandoned all claims and complaints growing out of any and all treaties previously made by them or other Indian Tribes, except for their claim to annuity rights under the September 17, 1851 Treaty of Laramie. In return for the cession of land and release of claims, the United States agreed to protect the Yankton Sioux in their "quiet and peaceable possession" of the tract reserved to them. Article 10 of the Treaty provided that "[n]o white person," with certain exceptions, "shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians, nor shall said Indians alienate, sell, or in any manner dispose of any portion thereof, except to the United States." The government also agreed to pay the Yankton Sioux or to expend for

their benefit, starting the year of their settlement upon the reservation, the total sum of $1.6 million in annuities over a period of fifty years, ending in 1908. The government also agreed to expend additional amounts during the first year of the Tribe's settlement on the reservation for the purchase of stock, agricultural implements, and fencing, and for the construction of houses, schools, and other buildings.

In July 1859, United States Agent Alexander Redfield founded the Yankton agency between Chouteau Creek and Fort Randall. H. Hoover, *A Yankton Sioux Tribal Land History* at 3 (1995). (Pl. Ex. 31.) The Yanktons' head chief, Struck By The Ree, followed, and within a few months, some 2,000 tribal members pitched tipis close to the agency. Eight band chiefs helped to settle the tribal members on the reservation. *Id.* The Yanktons entered a "revolution in life style as they accepted confinement on the reservation." *Id.*

In 1859, surveyors marked the outer boundaries of the reservation and surveyed 166 rectangular lots for family assignment, 87 of which were downstream and 79 of which were upstream from the agency. *Id.* at 4. By 1860, there were 2,053 Yanktons on the reservation, segregated into seven bands. *Id.* A "Chief Farmer" managed the 360.73-acre agency compound at Greenwood, on the Missouri River, and "supervised agricultural development and acculturation across the reservation." *Id.* at 5.

In the years that followed the 1858 Treaty, the federal government did not provide the Yanktons all of the financial assistance promised. Settled close to the Missouri River or in the breaks of the Missouri Hills, the Yanktons

broke prairie sod, opened farms, and built log homes. Report of the Commissioner of Indian Affairs at 424 (Oct. 1, 1891). (Gov't. Ex. 18.) Drought set in and burned up the crops, followed by devastating floods. As a result, the Yanktons believed that the Great Spirit was offended at them for cultivating the soil. *Id.* "Their work oxen and cows were soon in the soup, farm tools and wagons were soon thrown aside to rot, their clothing was cast off, and the whole nation went off on a buffalo hunt." *Id.* Upon their return many months later, the Yankton Sioux "found the Santees, their old-time allies, had opened up a horrid frontier war against the whites, and that emissaries from the hostile bands were waiting to counsel with them to engage the Yanktons also in hostilities against the Government." *Id.*

In 1864, when the Santee Sioux were raiding and killing the settlers of Minnesota, General Sully, at Fort Randall, enlisted in the service of the United States as scouts fifty-one Yankton Indians. "They took the field at once against their own kindred in defense of the white inhabitants of Dakota and Nebraska, and drove back the hostile Santees." Report of the Commissioner of Indian Affairs at 48 (1878). (Gov't. Ex. 18.) The Yankton scouts were honorably discharged at the end of the war, but without any pay, *id.*, a matter that would surface as a major point of contention with the Yanktons during discussions about the sale of their surplus lands in 1892. In the early 1880's, the Yankton Sioux claimed that, unlike other Indian tribes, "the blood of no white person stains their hands." Report Of The Commissioner of Indian Affairs at 61 (1881). (Gov't. Ex. 18.) The Yanktons viewed themselves as "[a]lways at peace and friendly even to

taking up arms against their own relations," and believed that, as a result, they "should receive greater consideration and benefit from [the white] people and government; that on the contrary they receive less, while those who fought the government imbued their hands in white man's blood, and obtain all they ask." *Id.*

In 1869, Moses K. Armstrong conducted a second survey of family lots on the Yankton Sioux Reservation, marking 177 lots of 80 acres each. H. Hoover, *A Yankton Sioux Tribal Land History* at 5 (1995). (Pl. Ex. 31.) In 1874, J.W. Beaman surveyed additional lots of 40 acres each, to make one available for each family. While several missionaries visited the reservation, Presbyterian John P. Williamson arrived as the first resident missionary in 1869, and Episcopal Father Joseph Cook settled in Greenwood in 1870. *Id.* at 4. As mission and federal facilities were built, "agency personnel gradually replaced 'recalcitrant' band chiefs with others more amenable to federal objectives[.]" *Id.* The growing population of non-Indian farmers, businessmen, and railroad men in the Upper Midwest pressured federal officials to open the surplus lands of Indian reservations for settlement.

"The decade of the 1860's was marked by an increasing volume of general Indian legislation [by Congress], coincident with a decline in the use of Indian treaties as an instrument of national policy. . . . The formative era of Indian relations ended with the Appropriations Act of March 3, 1871, providing for the termination of treaty making with Indian tribes." F. Cohen, Handbook of Federal Indian Law 126-27 (1982) (footnote omitted) (hereinafter Cohen). Codified at 25 U.S.C. § 71, the statute provided:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.

At least one commentator suggests that the "end of treaty making assumes an exaggerated historic importance unless understood in light of the comprehensive nature of federal involvement in Indian affairs." Cohen at 127 (footnote omitted). In the commentator's view,

> [t]he primary reason for the termination of treaty making in 1871 was political, the result of the House of Representatives' desire to have more control over Indian affairs and over the lands being ceded by the tribes. The federal-Indian relationship continued much as it had before 1871. Negotiations with tribes and land cessions resulted in "agreements" rather than treaties, and were ratified by both houses of Congress. Congress continued to establish reservations, make appropriations, and enact statutes affecting Indians. Like treaties, agreements and statutes are the "supreme law of the land," creating rights and liabilities that are virtually identical to those established by treaties.

Cohen at 127 (footnotes omitted). The prohibition on treaty-making "was a domestic political decision with little legal impact on the continuing relationship between the United States and Indian tribes[,]" and caused the federal government to look to other procedural methods in dealing with the Indian tribes. *Id.* at 128.

After 1871, a trend developed toward more comprehensive legislation as the government gradually moved away from the "tribe-by-tribe approach of the treaty making years. The result was a steady increase in statutory power vested in Indian service officials and a steady narrowing of the rights of individual Indians and tribes." Cohen at 128. The process of allotment of tribal lands in severalty and the assimilation of the Indians into white culture was deemed to be important for Indians and non-Indians alike. *Id.* Years of debate on allotment proposals followed. *Id.* at 131.

On February 8, 1887, Congress passed the General Allotment Act, also known as the Dawes Act, 24 Stat. 388, which mandated the allotment of land to individual tribal members on the reservations and negated the previous family assignments of land parcels. H. Hoover, *A Yankton Sioux Tribal Land History* at 5-6 (1995). (Pl. Ex. 31.) The Dawes Act did not expressly mandate the elimination of reservations. Senator Dawes, sponsor of the bill, had favored a voluntary program of allotments, but eventually supported compulsory allotment because he became convinced, like the humanitarian reformers, that destruction of the tribal system was inevitable if Indians were to participate fully in the American system. Cohen at 131. Allotments of land to individuals were thought to be of primary importance because the Indian concept of tribally-owned land was fundamentally different from the whites' concepts of civilization and individual land ownership, and the whites' view was considered to be superior. *Id.* White reformers also thought that a government patent would create greater security for the Indian allottee than would possession of land under tribal law or

custom and that settling the Indians in a permanent place would end their nomadic behavior. Indians who favored allotment placed faith in the patent in fee as protection against white encroachment and removal by the government. Cohen at 132.

The Dawes Act provided:

> That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon[.]

24 Stat. 388. Each head of a family was to receive one quarter section of land (160 acres), each single person over eighteen years of age and each orphan child under eighteen years of age was to receive one-eighth of a section (80 acres), and each single person under eighteen years of age or born prior to the date of the President's order directing allotment of the land was to receive one-sixteenth of a section (40 acres). *Id.* The Dawes Act further provided in section 5 that, upon approval of the allotments by the Secretary of the Interior, the Secretary would issue a patent in the name of each allottee, to be held in trust by the United States for twenty-five years for the sole use and benefit of the Indian allottee, and in

the case of the allottee's death, for the sole use and benefit of the allottee's heirs. Section 5 provided that, at the end of the trust period, the United States would convey the allotment

> in fee, discharged of said trust and free of all charge or incumbrance whatsoever . . . And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void[.]

24 Stat. at 389. Congress gave the President authority to extend the trust period in his discretion. *Id.*

Section 5 of the Dawes Act, significantly for this litigation, further provided:

> That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, *of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell,* on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress[.]

24 Stat. at 389-90 (emphasis added).

The Dawes Act stated in section 6 that, upon completion of the allotments and the issuance of patents to the allottees, the allottees would be subject to the civil and criminal laws of the State or Territory in which they resided. Moreover, each allottee "who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States." *Id.* at 390.[1]

Some of the Yanktons resisted the new allotment policy, and four companies of troops were sent from Fort Randall to quell the disturbances and restore order. H. Hoover, *A Yankton Sioux Tribal Land History* at 6 (1995). (Pl. Ex. 31.) Allotting Agent J.G. Hatchett arrived in 1889

---

[1] In 1905, the Supreme Court interpreted section 6 of the Dawes Act "to mean that Indian allottees were subject to plenary state jurisdiction immediately upon issuance of the trust patent. *See In re Heff*, 197 U.S. 488, 25 S.Ct. 506, 49 L.Ed. 848 (1905)." *Cass County v. Leech Lake Band of Chippewa Indians*, ___ U.S. ___, 118 S.Ct. 1904, 1907, 139 L.Ed.2d 285 (1998). Congress reversed the result of the *Heff* case in 1906 by passage of the Burke Act, 34 Stat. 182, 25 U.S.C. 349, *et. seq.*, providing that state jurisdiction did not attach until the end of the 25-year trust period, when the lands were conveyed in fee to the allottees. *See United States v. Pelican*, 232 U.S. 442, 450, 34 S.Ct. 396, 58 L.Ed. 676 (1914). The Burke Act, however, also contained a proviso permitting the Secretary of the Interior, if "satisfied that any Indian allottee is competent and capable of managing his or her affairs," to authorize issuance of a fee simple patent before the end of the usual trust period, removing all restrictions as to sale, incumbrance, and taxation of the land. *Cass County*, ___ U.S. at ___ 118 S.Ct. at 1907. The effect of the Burke Act and other post-ratification statutes on the Yankton Sioux allotments will be addressed later in this opinion.

to parcel out the individual allotments on the Yankton Sioux Reservation. *Id.* Protests by the Indians hampered his work, *id.*, but the allotments were completed that year and in 1890, Hatchett equalized the allotments, utilizing approximately one-half of the reservation. Report of the Commissioner of Indian Affairs at 428 (Oct. 1, 1891). (Gov't. Ex. 18.) Hatchett continued to refine the list of allotments, and in 1892 reported the assignment of 1,700 allotments on approximately 262,000 acres of the Yankton Sioux Reservation. H. Hoover, *A Yankton Sioux Tribal Land History* at 6 (1995). (Pl. Ex. 31.) Hatchett's report negated all previous land assignments, and tribal members were required to scatter on their new family farms located across the reservation. *Id.* at 6 & n.15.

Of the 430,495 acres of land comprising the 1858 Yankton Sioux Reservation, 167,325 acres were allotted and patented to the Indians under the Dawes Act. By early 1894, allotments under the Act of February 28, 1891, 26 Stat. 594, had been made in the field, but those allotments had not been examined and approved. The federal government estimated that some 95,000 additional acres had been allotted after passage of the 1891 Act, leaving surplus lands of approximately 168,000 acres, which were ceded by the Yankton Sioux for $600,000, or $3.62 per acre.[2] S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 5 (1894); (Pl. Ex. 5.)

---

[2] The Court of Claims later determined that the Yankton Sioux ceded 201,110 unallotted acres in the 1892 Agreement and that those acres had a fair market value of $1,337.381.50, [sic] or about $6.65 per acre, on December 31, 1892. *Yankton Sioux Tribe v. United States*, 623 F.2d 159, 174 (Ct.Cl. 1980).

Congress having officially ended treaty-making with the tribes in 1871, the last large-scale sale of land to the United States by the Yankton Sioux Tribe occurred as a result of an 1892 Agreement, after an 1884 government attempt to obtain the sale of the Yanktons' surplus lands failed. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 12 (1894); (Pl. Ex. 5.) In 1892, the Secretary of the Department of the Interior appointed three members to serve on the Yankton Indian Commission to negotiate the sale of the surplus land owned by the Yankton Sioux. (Pl. Ex. 28.) The three commissioners were John J. Cole, J.C. Adams, and Dr. W.L. Brown; however, Dr. Brown resigned from the Commission before an agreement was reached, and his replacement, L.W. French, was never qualified to act as a Commissioner and took no part in the negotiations. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 7-8, 34 (1894); (Pl. Ex. 5.) These discussions did not take place with tribal leaders in Washington, D.C., as had the negotiations resulting in the 1858 Treaty. The Commissioners were sent to the Yankton Sioux Reservation "to negotiate . . . for the cession of their surplus lands," and "[i]f [the Yankton Sioux] are unwilling to cede all the surplus land you will endeavor to obtain the relinquishment of such part thereof as they may be willing to part with."[3] Instructions to the Yankton Indian Commission (July 27, 1892), reprinted in *Yankton Sioux Tribe* U.S. Supreme Court Joint Appendix Vol. I at 98-99.

---

[3] The Court agrees with the Eighth Circuit's earlier conclusion from these instructions that, "[h]ad the intent been the elimination of the reservation, it would have been necessary that all surplus lands be purchased." *Yankton Sioux Tribe*, 99 F.3d at 1452.

Although the 1894 Congress and courts have been careful to distinguish between the 1858 "Treaty" and the 1892 "Agreement," *see, e.g.*, S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 1 (1894) (Pl. Ex. 5.); *Yankton Sioux Tribe*, ___ U.S. at ___ 118 S.Ct. at 793, the Commissioners sent to the reservation and the Yankton Sioux repeatedly mentioned during the 1892 discussions concerning the sale of surplus lands that their work would result in a "treaty" that would be ratified by Congress. Before the Commissioners left the Yankton Sioux Reservation for Washington to present the 1892 Agreement to Congress, a copy of the Agreement was left in the Yanktons' treaty book, which was turned over to Rev. Williamson for safekeeping. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 48-96, 97 (1894). (Pl. Ex. 5.) Moreover, then Secretary of the Interior Hoke Smith, in the first sentence of his 1894 cover letter submitting the Agreement and the reports of the work underlying it to Congress, stated that he had the honor "to submit herewith an agreement made by the commission appointed to treat with the Yankton tribe of Dakota or Sioux Indians[.]" *Id.* Similarly, the Acting Commissioner of Indian Affairs referred to the Agreement as a "treaty" in his report to the Secretary of the Interior, *id.* at 5, and those chiefs and head men of the Yankton Sioux Tribe who wrote to Congress urging ratification of the Agreement referred to it as the "treaty of December 31, 1892." S. Rep. No. 196, Committee on Indian Affairs, 53rd Cong., 2d Sess. at 2 (1894). (Pl. Ex. 7.)

These references to treaty-making by the primary participants are significant, because the references establish that the Tribe, which likely was not aware that Congress technically had ended treaty-making by statute in

1871, nonetheless continued to view its interactions with the federal government within the historic context of the political relationship that had existed between the Tribe and the federal government beginning with the Treaty of 1815. The references also confirm the commentator's view that the "federal-Indian relationship continued much as it had before 1871[,]" Cohen at 127, and that the only major difference between a "treaty" and an "agreement" was that both Houses of Congress had to ratify an "agreement," while only the Senate ratified a treaty.

II. The Sale of Surplus Lands and the 1892 Agreement

The crucial question presented is whether the 53rd Congress, legislating during the allotment era, intended by the Act of 1894, ratifying the 1892 Agreement with the Yankton Sioux, to disestablish the Yankton Sioux Reservation completely. This becomes a highly complicated question in light of the Supreme Court's *Yankton Sioux Tribe* decision holding that the Yankton Sioux Reservation is diminished to the extent of the surplus lands sold through the 1894 Act. Diminishment ordinarily suggests a shrinking of the land mass reserved to the tribe, with a clear demarcation between the land removed from reservation status, and the land retained in reservation status. *See, e.g., Rosebud*, 430 U.S. at 606-615, 97 S.Ct. at 1373-1377 (holding that congressional acts diminished boundaries of Rosebud Reservation by removing from reservation land situated in four counties of South Dakota).

Such a clear demarcation is not present here, where the Yankton Sioux allotments purposely were interspersed over the entire 1858 reservation to help ensure

that the Indians would live closely with the whites who settled on the intermingled ceded lands and thereby assimilate into white culture. The Supreme Court recognized that diminishment ordinarily affects the placement of reservation boundaries, *see Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. at 798, 799, 800, but nowhere in its opinion did the Supreme Court explain how the Yankton Sioux Reservation boundaries changed as a result of the diminishment. The court stopped short of holding the Yankton Sioux Reservation terminated or disestablished as it could have done if it thought *DeCoteau* was controlling, *id.* at 805, and instead signaled at points in its opinion that perhaps the reservation is not disestablished. *Id.* at 801, 805. The Supreme Court spoke of Congress intending by the 1894 Act "to modify the reservation," *id.* at 798, or to work "a reconception of the reservation[.]" *Id.* at 802. The Supreme Court did not elaborate upon how such a modified or reconceived reservation should be envisioned. If the original exterior boundaries remain, as it appears they do from the Supreme Court's opinion, then the Supreme Court has effectively created within those boundaries an " 'impractical pattern of checkerboard jurisdiction,' " a result which the Supreme Court in the past has disfavored as contrary to the approach preferred by Congress and codified at 18 U.S.C. § 1151, to avoid jurisdictional confusion. *See Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478, 96 S.Ct. 1634, 1643-44, 48 L.Ed.2d 96 (1976) (quoted case omitted); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 358, 82 S.Ct. 424, 428-29, 7 L.Ed.2d 346 (1962). Because the Supreme Court has not explained how the diminishment affected reservation boundaries, this Court "cannot

assume that Congress would intend to change the reservation to an area without defined boundaries and, in addition, create a confusing checkerboard pattern of jurisdiction." *United States v. Long Elk*, 565 F.2d 1032, 1039 (8th Cir. 1977).

The Tenth Circuit confronted an identical boundary problem following the Supreme Court's diminishment decision in *Hagen*. *See Ute Indian Tribe of Uintah and Ouray Reservation v. Utah*, 114 F.3d 1513 (10th Cir. 1997), *cert. denied sub nom. Duchesne County v. Ute Indian Tribe of Uintah and Ouray Reservation*, 118 S.Ct. 1034 (1998). The *Hagen* decision, which affirmed a judgment of the Utah Supreme Court, directly conflicted with a prior en banc decision of the Tenth Circuit that the Uintah Valley Reservation was not diminished or disestablished. After *Hagen*, the Tenth Circuit recalled its mandate and modified its previous decision only to the extent necessary to reconcile the opinion with *Hagen*. *Ute Indian Tribe*, 114 F.3d at 1528. The Tenth Circuit held, consistently with *Hagen*, that Acts of Congress between 1902 and 1905 diminished the reservation to the extent of the unallotted lands that were opened to non-Indian settlement, but that the Acts did not entirely disestablish the reservation. *Id.* The court concluded that the original exterior reservation boundaries remained intact and that all lands originally allotted to tribal members remained within the limits of the reservation and constituted Indian country under 18 U.S.C. § 1151(a), even though a substantial portion of those allotted lands had passed into fee status after 1905. *Id.* at 1529-30. When given the opportunity to grant a petition for certiorari and review the Tenth Circuit's decision, the

Supreme Court declined and denied the petition for a writ of certiorari.

The disestablishment question now before this Court closely mirrors the issue before the Tenth Circuit in *Ute Indian Tribe*, and the Court draws some guidance from that opinion. But each agreement with an Indian tribe is different and must be evaluated in light of all the circumstances attendant to its making. *Hagen*, 510 U.S. at 410-13, 114 S.Ct. at 965-66. Thus, the Court begins its analysis from the familiar legal premise that Congress created the Yankton Sioux Reservation in the 1858 Treaty, and only Congress can eliminate it by explicitly indicating its intent to do so. *See Solem v. Bartlett*, 465 U.S. 463, 470, 104 S.Ct. 1161, 1166, 79 L.Ed.2d 443 (1984). The Supreme Court "does not lightly conclude that an Indian reservation has been terminated," *DeCoteau*, 420 U.S. at 443, 95 S.Ct. at 1092, and this Court likewise will not lightly reach such a determination. Once Congress has established a reservation, all tracts included within it are a part of the reservation until separated from it by Congress. *Id.*, 420 U.S. at 443, 95 S.Ct. at 1092-93. The 1894 Act of Congress which opened the Yankton Sioux Reservation to allow non-Indians to purchase land and settle there and which, according to the Supreme Court, diminished the size of the reservation only to the extent of the ceded lands, is not inconsistent with the preservation of the 1858 Treaty boundaries. *See Solem*, 465 U.S. at 470, 104 S.Ct. at 1166; *DeCoteau*, 420 U.S. at 444, 95 S.Ct. at 1093. Ambiguities must be resolved in favor of the Yankton Sioux, *see Hagen*, 510 U.S. at 411, 114 S.Ct. at 965, and the Supreme Court "requires that the 'congressional determination to terminate . . . be expressed on the face of the

Act or be clear from the surrounding circumstances and legislative history.' " *DeCoteau*, 420 U.S. at 444, 95 S.Ct. at 1093. Thus, to follow the disestablishment inquiry as defined in *DeCoteau*, the Court must consider the language of the 1894 ratification statute and the 1892 Agreement it incorporated, as well as the legislative history of the Act, and the surrounding historical circumstances.[4]

The Court believes it is helpful to begin with the historical circumstances surrounding the making of the 1892 Agreement as documented in the reports of the Yankton Indian Commission. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 48-97 (1894); (Pl. Ex. 5.) (hereafter "Negotiations".) These detailed reports provide clear

---

[4] While one might reason that subsequent acts of Congress should be examined to see if they shed any light on the meaning of the 1894 Act, the Supreme Court disapproves of such an approach, noting that " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. at 803 (quoted case omitted). It appears, moreover, that the Supreme Court similarly eschews giving weight to evidence explaining the actions of the President and the executive departments in implementing the intent of Congress or to evidence showing the understanding of non-government parties. In reaching its decision that the Yankton Sioux Reservation is diminished, the Supreme Court summarily dismissed "the scores of administrative documents and maps marshaled by the parties to support or contradict diminishment" because such evidence had "limited interpretative value." *Id.* at 803-04. Rather, for the foundation of its decision, the Supreme Court relied upon the "strong textual and contemporaneous evidence" to find diminishment. *Id.* at 804. This Court likewise focuses upon the strong textual and contemporaneous evidence surrounding the 1894 Act and the making of the 1892 Agreement to determine that the Yankton Sioux Reservation was not disestablished.

insight into the mindset of the Commissioners and the Yankton Sioux as they negotiated for the sale of the surplus lands. These reports were included in the legislative history of the 1894 Act ratifying the 1892 Agreement, and the Senate and House Reports forwarding the Act from the Committees on Indian Affairs to the floor called special attention to the report of the Yankton Sioux Commission and all of their proceedings. S. Rep. No. 196, Committee on Indian Affairs, 53rd Cong., 2d Sess. at 1 (1894) (Pl. Ex. 7); H. Rep. No. 570, Committee on Indian Affairs, 53rd Cong., 2d Sess. at 1 (1894). (Pl. Ex. 8.)

A. The Reports of the Yankton Indian Commission

The Commissioners held ten councils which were attended by the Indian Committee of 24 named to represent the Yankton Sioux Tribe, the ten moderators, the chiefs, the head men, and varying numbers of members of the Tribe. The first two of the ten councils occurred on October 8th and 24th of 1892, and the remaining eight councils occurred between December 2nd and 17th of 1892. Very little, if any, discussion during the councils was directed to hammering out the terms of the twenty Articles that ultimately became the 1892 Agreement. Negotiations at 48-97. Tribal members generally spoke in favor of or in opposition to the sale of the surplus lands, expressing explicitly their perceived view of themselves as ignorant and inferior to the wiser, educated Commissioners. *Id.* at 52.[5] The Indians' speeches were laced with

---

[5] In deciding a dispute over the western boundary of the Yakima Indian Reservation in 1913, the Supreme Court said that

suspicion and distrust of the United States because of previous unhonored treaty terms, and with paramount concern for the price the United States would pay for the surplus lands. The Committee of 24 developed a list of twelve propositions, or grievances, that the Tribe wanted addressed in the agreement to sell the surplus lands. *Id.* at 52, 57. The Commissioners eventually agreed to incorporate as many of the propositions as their instructions from Washington would allow. *Id.* at 60. Along the way, however, the Commissioners attempted to convince the Indians that they could not resist the tide of change, that the President and the Secretary of the Interior were their friends, that the United States had fulfilled all terms of the 1858 Treaty, that the United States would deal fairly with the Indians, and that sale of the surplus lands was in the Tribe's best interest. *Id.* at 65-69.

What is clear throughout the Commissioners' reports of their councils with the Tribe is that their mission was to obtain the sale of the surplus lands, and no more. This Court, the Eighth Circuit, and the Supreme Court each acknowledged in the previous stage of this litigation that the parties, in reaching the 1892 Agreement, did not discuss the future boundaries of the reservation or the relinquishment of the entire reservation by the Tribe, but memorialized only the consent of the Tribe to sell the surplus lands remaining after the allotment process was

---

its "effort must be to ascertain and execute the intention of the treaty makers, and as an element in the effort we have declared that concession must be made to the understanding of the Indians in redress of the differences in the power and intelligence of the contracting parties." *Northern Pacific Ry. Co. v. United States*, 227 U.S. 355, 362, 33 S.Ct. 368, 57 L.Ed. 544 (1913).

completed. *Yankton Sioux Tribe*, 890 F.Supp. at 883-84; *Yankton Sioux Tribe*, 99 F.3d at 1453; *Yankton Sioux Tribe*, ___ U.S. at ___ 118 S.Ct. at 795. If the Commissioners had intended to terminate the reservation and communicated that to the Indians, that would have made their mission even more difficult.

Comments made by the Commissioners during the councils with the Yankton Sioux support the conclusion that the Commissioners and the Tribe did not perceive their work as causing a complete disestablishment of the reservation. In his earliest comments during the first council with the Tribe, Commissioner Adams stated, "We understand that you each received an allotment of land on which to make a home. . . . we also understand that you own, outside of your allotments, a large quantity of land in common. It is this land that you own in common that we were appointed by the Great Father to talk to you about." Negotiations at 48. Although these comments immediately bring to mind the Dawes Act and the policies behind it, what Commissioner Adams had to say to the Tribe just a few moments later is striking. He said: "It might be, after you sold your lands, you could have this reservation organized as a separate county. If this could be done – I do not say it can – you could govern your own people in your own way, so long as you obeyed the laws of the State. I do not say this can be done, but see no good reason why it might not be done." *Id.* Commissioner Adams apparently held the view that the allotment policy and tribal self-government could co-exist, and he set the tone for the negotiations by conveying such a view in his very first address to the Tribe.

Likewise, during the first council, Commissioner Cole told the Indians that the "Great White Father . . . does not want you to sell your homes that he has allotted to you. He wants you to keep your homes forever. He only wants you to sell your surplus lands for which you have no use." *Id.* at 49. Cole assured the Indians, "[y]ou not only have a home as a tribe, but every man, woman, and child among you each now has a home which no one can take away from you and the Great White Father wants you to always keep these homes and live on them in peace and comfort like white men, and be citizens and have plenty." *Id.* Cole also remarked, "The Great Father and his Great Secretary [of the Interior], Mr. Noble, think you have acted wisely in selecting your homes in severalty. . . . They have sent us here to buy these surplus lands for homes for white men who will settle among you; who will live peaceably and neighborly with you; who will cultivate these surplus lands and make your allotted lands much more valuable." *Id.* at 50. In response to the statements of Adams and Cole, Henry Stricker replied, "if you will help us we hope we will make a treaty that will be beneficial to us as a tribe." *Id.*

At the second council, the tribal members asked to see the form contract held by the Commissioners, which was produced. Remarkably, a question arose whether the tribal members would be permitted to make comments about the provisions contained in the form agreement, and this apparently generated extensive discussion. The Commissioners reported to Congress that "[i]t was finally agreed that [the agreement] should be translated to the council and such comments as may be made by any of the committee of 24, could not, and should not be considered

final." *Id.* at 51. The contract was then read article by article through oral translation into the Dakota language and, at the Tribe's request, the contract was also translated in a written form for use and consideration by the Committee of 24. *Id.* With that, the council ended.

In the series of eight councils that occurred during the sixteen-day period from December 2 to December 17, 1892, more comments were made suggesting that the Commissioners and the tribal members thought the intent of the "Great White Father" was to open the reservation for settlement rather than to disestablish it. Robert Clarkson, a member of the Tribe, said, "White men see our surplus lands every day traveling through it. They have a lawyer sent to Congress to open this reservation and surplus land." *Id.* at 61. Commissioner Brown acknowledged that the 1858 Treaty "set aside for your people a reservation with certain boundaries[,]" which was supposed to contain 400,000 acres. *Id.* at 66. He admonished the Tribe to consider that, when the reservation was surveyed, it actually contained 430,495 acres, "more than the Government agreed to let you have." *Id.* He assured the Indians that "schoolhouses will be put up all over the agency[.]" *Id.* at 67.

To convince the Indians that the strong federal government was looking out for the interests of the poorer Tribe, Commissioner Brown gave as an example two Indians, one strong and well-looking, and one half-starved, asking the Commissioners to divide a piece of beef between them. He said "it would be natural and right to give the one who was sick more than the other . . . and if we make this treaty we want to give you the biggest half." *Id.* at 67. Commissioner Cole named as the

"principal object of the treaty" to make both the allotted and the surplus lands valuable, *id.* at 68, and explained potential differences in income to tribal members, to be derived primarily from land rent, "after the surplus lands have been occupied by white people." *Id.* at 69. A dominant theme of the Commissioners was that the government wanted the Indians to live close to the white settlers so that the Indians could emulate the non-Indians, *see id.* at 71-72, but the reason given was not the government's desire to eliminate the reservation. Rather, the Commissioners reminded the Indians that, with the loss of wild game and a declining ability to roam and hunt as in the past, the Indians needed to adapt to the changed conditions around them, and to learn to obtain their food, clothing, and income like white men. *Id.* at 71-72.

Commissioner Adams instructed the Indians as to how they might rent the uncultivated portions of their allotments to white men to generate cash income, using as an example his personal experience at the Sissetons' reservation. *Id.* at 72-73. The Commissioners had already told the Yanktons that the $2.50 per acre that the United States paid the Sisseton-Wahpeton Sioux Tribe for the surplus lands on the Lake Traverse Reservation in 1891, the year before, was the highest price Congress had ever paid for surplus Indian lands. *Id.* at 68. Despite the Sissetons' sale of all of their surplus lands, Commissioner Adams viewed the Lake Traverse Reservation as still in existence:

> Here is the line of the Sisseton Reservation in my county. I live here, about 15 miles from the line of the Sisseton. Right here lives a friend of

> mine by the name of Vick, just outside the reservation line. Just inside of the line of the reservation lives an Indian friend of mine by the name of Chunek. He has land which has plenty of grass upon it. Vick asked Chunek to let him cut grass on his land. He agreed to and Vick was to pay 50 cents per ton for all he cut. This man cut 150 tons of hay and paid Chunek $75 for it. Chunek did not do anything but lie in the grass and see others work and got $75. It was just as if Chunek had gone out into the middle of the road and picked it up. Now, my friends, what made the grass on Chunek's farm worth money? Because his tribe had sold their surplus land and he had become a citizen of the United States and could rent his land. This he could not do until the surplus land was sold to the Government. If this Indian can do this why cannot you?

Id. at 72. Considering these remarks, and this Commissioner's earlier comments that it might be possible to "have this reservation organized as a separate county[,]" and "you could govern your own people in your own way, so long as you obeyed the laws of the State[,]" the Yankton Sioux reasonably could have concluded that, as a result of the sale of their surplus lands, the "Great Father" would, in time, make them citizens of both the State of South Dakota and the United States, and yet permit them to continue to govern themselves as a Tribe on the allotted lands.

Despite all of the efforts of the Commissioners, during the council on December 10, 1892, some tribal members reported the Indians had stayed up night and day debating the matter, but had decided not to sell their surplus lands. *Id.* at 73. Other tribal members disagreed,

saying the Tribe was willing to sell, but the only disagreement was price. Commissioner Cole became adamant:

> Now, I want you to understand that you are absolutely dependent upon the Great Father today for a living. Let the Government send out instructions to your agent to cease to issue these rations, let the Government instruct your agent to cease to issue your clothes. Let the Government instruct him to cease to issue your supplies, let him take away the money to run your schools with, and I want to know what you would do. Everything you are wearing and eating is gratuity. Take all this away and throw this people wholly upon their own responsibility to take care of themselves, and what would be the result? Not one-fourth of your people could live through the winter, and when the grass grows again it would be nourished by the dust of all the balance of your noble tribe.
>
> * * * *
>
> [The Great Father] did not send this commission until every one of you, down to the smallest baby, *has a home of their own on this reservation*.

Id. at 74-75 (emphasis added). From this speech and the fact that the Yanktons had lived on family allotments on the reservation for thirty-three years, the Yanktons could, and most probably did, draw the conclusion that their individually allotted lands remained in reservation status, but that the continuation of their annuities and all other forms of federal financial assistance depended upon their agreement to sell the surplus lands. Yankton Agent Foster then spoke in favor of the Agreement, but advised the Tribe not to settle on the price. *Id.* at 75. Felix Brunot called for a vote, which caused confusion and

wrangling among the factions of the Tribe favoring and opposing the sale. *Id.* at 76. Commissioner Cole refused to recognize any vote because less than a majority of the adult male members of the Tribe were present. *Id.*

At the next council, the Commissioners asked the Committee of 24 to designate six individuals, representing the factions in the Tribe, to meet with the Commission to draft a treaty. *Id.* at 76-77. This proposal also met with disagreement because tribal members believed the Commission refused to recognize the stated decision of the Committee of 24, representing the Tribe, not to sell the surplus lands. *Id.* at 78. Cole defended his proposal of a subcommittee as necessary to work out the small details. The friends of the treaty appointed three members to the proposed subcommittee, but the opposition understandably did not present any members for such service. *Id.* at 78, 81.

In the last council, on December 17, 1892, Commissioner Brown resigned to eliminate any possibility that he was the cause of the Tribe's refusal to sell the surplus lands, as he had heard rumors that he was to blame. *Id.* at 79. Commissioner Cole then eloquently addressed the Tribe:

> This reservation alone proclaims the old time and the old conditions. But even here the means of your former mode of life have vanquished. The tide of civilization is as resistless as the tide of the ocean, and you have no choice but to accept it and live according to its methods or be destroyed by it. *To accept it requires the sale of these surplus lands and the opening of this reservation to white settlement.*

Id. at 81 (emphasis added). The council adjourned, and approximately two weeks later, on December 31, 1892, the Commissioners announced their completion of an Agreement for the sale of the surplus lands, after their consultation with the chiefs and head men and the white missionaries considered to be friends of the Tribe. *Id.* at 83-84.

At no point in the Commissioners' reports is there any mention, by a Commissioner or by a Yankton Sioux, of any anticipated change in the reservation boundaries or of a disestablishment or termination of the Yankton Sioux Reservation. At no point in the Commissioners' reports is there any mention of a transfer of the Yanktons' tribal sovereignty to the United States or the State of South Dakota.

On January 3, 1893, missionary John Williamson sent a letter to Commissioner Cole, stating that he thought the terms were the most liberal the Indians would get, that he had no doubt the provisions would be faithfully carried out, and "further there is no cause for apprehension that this agreement will in any way interfere with the treaty of 1858." *Id.* at 84. Joseph Cook, the Episcopal missionary, concurred with Williamson that the Agreement was advantageous for the Tribe. *Id.* A draft of the Agreement was sent to Secretary of the Interior Noble in January 1893, and his minor suggested changes were made. *Id.*

There is no indication in the Commissioners' reports that the Yanktons reached a consensus to support the Agreement. To the contrary, the Commissioners' reports

in early 1893 describe vehement opposition to the Agreement and hardships the Commissioners faced in obtaining signatures to the Agreement by the majority of the adult male members of the Tribe. *Id.* at 85-97. Councils were held to read the Agreement to the tribal members, and the Commissioners waited day after day for tribal members to come to them and sign the Agreement. The Commissioners traveled across the reservation looking for elderly and infirm signatories, and even crossed into Nebraska to take the signatures of Yankton soldiers who were not present on the Yankton Sioux Reservation during the negotiations. *Id.* at 92-93. By March of 1893, the Commissioners obtained a sufficient number of signatures – 255 of the 458 members eligible to sign – and the Commission departed for Washington. *Id.* at 21, 97.

Two federal investigators were sent separately to the Yankton Sioux Reservation in 1893 to investigate allegations of fraud in the procurement of signatures on the Agreement. Indian Inspector John W. Cadman reported in November 1893 that he had uncovered only one incident of possible undue influence, but that he did not believe such had occurred in that case. He also reported that some tribal members who had signed the Agreement wished to change their minds, while others wished to sign the Agreement for the first time. *Id.* at 35. Special Agent Cooper also found no evidence of coercion by the Commissioners in reaching the Agreement. *Id.* at 95.

The Report of the Commissioner of Indian Affairs dated September 16, 1893 (Pl. Ex. 10), written before Congress ratified the 1892 Agreement, stated the Indians had "not signified their assent that such reservation

might be embraced within the Territory of Dakota or State of South Dakota[,]" and further,

> Notwithstanding that all the Indians have accepted allotments and land patents have been issued to many of them for their lands, yet their relationship with local State authorities has not changed. The reservation has been within an organized county for many years, yet the county authorities decline to recognize the Indians or any of the residents of the reserve as entitled to the rights and privileges of citizenship. The constitution of the State of South Dakota expressly disclaims any right or title to any lands owned or held by an Indian or Indian tribe and are exempt from taxation, and this is held to disclaim any jurisdiction over the tribe, either civil or criminal, of the residents within an Indian country.
>
> * * * *
>
> It is clear, then, that the United States exercises sole and exclusive jurisdiction over the reservation except in so far as it may see fit to grant the State the right to exercise its jurisdiction.

B. The Language of the 1892 Agreement and the Legislative History of the 1894 Ratifying Act

The entire 1892 Agreement and its preamble were incorporated into the 1894 ratifying statute. (Pl. Ex. 2, hereafter "Act".) Congress stated in the Act that it "accepted, ratified, and confirmed" the 1892 Agreement and:

> [t]hat the lands by said agreement ceded to the United States shall, upon proclamation by the

> President, be *opened to settlement*, and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes and be subject to the laws of the State of South Dakota[.]

Act at 6 (emphasis added). Congress' statement that the ceded lands shall be "opened to settlement" is ambiguous in that it does not make clear whether the Yankton Sioux Reservation is disestablished or whether the Reservation is diminished only to the extent of the ceded lands. Where there is an ambiguity in a statute, a preamble can be utilized to help discern the intent of Congress. *See Jurgensen v. Fairfax County*, 745 F.2d 868, 885 (4th Cir. 1984). The preamble to the 1892 Agreement cited the 1892 appropriations act authorizing the Secretary of the Interior "to negotiate with any Indians for the *surrender of portions of their respective reservations*, any agreement thus negotiated being subject to subsequent ratification by Congress[.]" Act at 1 (emphasis added). The preamble also recited that the Yankton Sioux Tribe "is willing to *dispose of a portion of the land set apart and reserved to said tribe, by the first article of the treaty of April (19th) nineteenth, eighteen hundred and fifty eight (1858)*, between said tribe and the United States, and situated in the State of South Dakota[.]" Act at 1 (emphasis added). The emphasized portions of the preamble clearly indicate congressional intent to accept the will of the Yankton Sioux Tribe to cede only a portion of the reservation established by the 1858 Treaty. Similarly, in *Solem*, 465 U.S. at 472-74, 104 S.Ct. at 1167-68, the Supreme Court concluded that the

phrase "sell and dispose" indicated congressional intent to maintain existing reservation boundaries of the Cheyenne Reservation in South Dakota. Thus, the language of the 1894 Act of Congress contradicts any suggestion that the Yankton Sioux Reservation is disestablished.

Congress added the provision about reserving the sixteenth and thirty-sixth sections for common school purposes. The Supreme Court interpreted similar language in the Rosebud Acts as intended by Congress to conform them to the enabling legislation which admitted the State of South Dakota into the Union, and reasoned that Congress thereby intended to diminish the Rosebud Reservation. 25 Stat. 679 (1889); *Rosebud Sioux Tribe*, 430 U.S. at 599-601, 97 S.Ct. 1369-70. In *Yankton Sioux Tribe*, the Supreme Court recognized the State's position, relying on *Rosebud*, that the school sections clause indicated a view that Congress meant to extinguish the reservation status of the ceded lands, ___ U.S. at ___, 118 S.Ct. at 801, but, referring to Article VIII, not Article VII, the Supreme Court concluded that " . . . a somewhat contradictory provision counsels against finding the reservation terminated." The Supreme Court cited its earlier conclusion in *DeCoteau* that the school sections clause implied nothing about the presence or absence of state civil and criminal jurisdiction over the remainder of the ceded lands, and the Supreme Court did not consider at all the effect of the school sections clause on the allotted, unceded lands. In *DeCoteau*, where the Lake Traverse Reservation was held to be disestablished, the Supreme Court dismissed the school sections clause in a footnote as irrelevant to the dispute before the Court. *DeCoteau*, 420 U.S. at 444 n.33, 95 S.Ct. at 1093 n.33. The Supreme Court observed that

the clause was not part of the agreement sent to Congress for ratification, there was no indication Congress added the clause with the intent to qualify the terms of the cession agreement, and it was Congress' usual practice to include the clause in "opening public lands to settlement[.]" *Id.*

This Court concludes that the school sections clause is equally irrelevant here, as it was in *DeCoteau*, but even if the clause is deemed relevant, a probable interpretation of it is that Congress wanted to be sure common schools would be available for all residents, Indian and non-Indian, in the opened, assimilated Yankton Sioux Reservation. If Congress had intended to disestablish the Yankton Sioux Reservation, the common school sections would have been subject to state law in any event and such language would have been wholly unnecessary.

Nothing in the explicit language of the 1892 Agreement supports disestablishment of the Reservation. The first two Articles, which were the focus of the previous *Yankton Sioux* cases, ceded to the United States the surplus lands for a sum certain and diminished the size of the Reservation. *Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. at 798. Articles III, IV, and VI pertained to the method of payment to the Tribe of the principal and interest received upon the sale of the surplus lands, and those Articles do not shed any light on the disestablishment issue.

Many of the remaining Articles of the 1892 Agreement also do not further the disestablishment analysis. They provided for gifts of $20 gold pieces to males of the

Tribe, Article VII; permitted leasing of uncultivated allotted land, Article IX; permitted religious societies to continue working among the Indians, Article X; prohibited payment of the land purchase price to the Indians to settle claims prior to the Agreement, Article XII; fixed the status of mixed bloods, Article XIII; prohibited Congress from alienating the allotments from the Indians before sale of the surplus lands to settlers, Article XIV; settled the claims of the Yankton scouts and the Tribe's claim to the Pipestone Reservation, Articles XV and XVI; provided for placement of a copy of the Agreement in the Yanktons' "Agreement Book," Article XIX; and bound both parties upon ratification by Congress, Article XX. Consequently, these Articles will not be discussed in any detail.

1. Article V

Article V provided for the set aside and use of the interest on the land purchase price to continue funding services for the Yanktons' most helpless members, for schools and educational purposes, and "for courts of justice and other local institutions for the benefit of said tribe[.]" The evidentiary record before the Court establishes that, years before the 1892 Agreement, Congress authorized the creation of an Indian police force and a Court of Indian Offenses on the Yankton Sioux Reservation, and that such a police force and a Court of Indian Offenses operated to govern tribal affairs at the time of the ratification. H. Hoover, *Yankton Tribal Police and Court of Indian Offenses, 1859-1943* (1998). (Gov't. Ex. 16.) Article V's provision for continued funding of these and "other local institutions" signals congressional intent consistent

with the continuing reservation status of the allotted lands and an intent to preserve tribal self-government within the 1858 boundaries on the allotted lands.

Section 2 of Article V solidified the understanding of the Yanktons and the Congress, consistent with the Dawes Act, that the Yanktons' land patents would be held in trust for twenty-five years, and at the end of that trust period, the Yanktons would receive from the United States a complete title to their allotted lands, and would then assume all the duties and responsibilities of citizenship. Such language indicates a congressional intent that there would be an ongoing relationship between the Yanktons and the federal government during the twenty-five year assimilation period. Because the Yanktons were not to receive patents in fee immediately, the Yanktons continued to live on land that was essentially retained in reservation status but apportioned to them individually. Such an interpretation is supported by evidence in the record showing that three U.S. Presidents – Woodrow Wilson, Calvin Coolidge, and Herbert Hoover – extended by Executive Order the trust period on certain of the allotted lands, and in each Executive Order, the President explicitly referred to "the trust period on the allotments of Indians *on the Yankton Sioux Reservation*[.]" (Gov't. Exs. 10-12.)

Acts of Congress subsequent to the 1894 Act, such as the Burke Act of 1906, facilitated the alienation of a substantial number of Indian allotments to non-Indians by 1913, through such means as allowing the Secretary of the Interior to grant patents in fee to certain "competent" Indians prior to the expiration of the trust period and through sales of heirship lands. (Pl. Exs. 21-22; Pl. Ex. 2,

1892 Agreement, Article XI.) These sales of allotments were not always the result of arms-length negotiation. The allegations of a 1921 complaint brought by the United States on its own behalf and as guardian of certain Yankton Indians and their heirs indicates that the federal government viewed the Yankton Reservation as still in existence and gives insight into the federal government's concerns about the means by which sales of allotments were obtained. *United States v. Caster*, 271 F. 615 (8th Cir.), *appeal dismissed*, 257 U.S. 666 (1921).

The United States brought the action for the purpose of obtaining a decree adjudging the United States to be the owner of the allotted lands at issue, subject to the rights of the allottees, and for the cancellation of all conveyances of the lands made by the Indian allottees to the non-Indian defendants. *Id.* at 616. The lands in question had been allotted under section 5 of the Dawes Act of 1887, to be held in trust for twenty-five years. *Id.* On April 20, 1916, the President of the United States by Executive Order extended the trust period for ten more years as to the allotted lands at issue. *Id.*

The complaint alleged that, to assist the Secretary of the Interior in exercising his authority under the Burke Act of 1906, the Secretary appointed a three person commission, which included "A.W. Leech, Superintendent of the Yankton Reservation," and directed the commission to investigate the competency and capability of the "Indian allottees residing on the Yankton Reservation to manage and control their property." *Id.* After investigation, the commission submitted reports to the Secretary representing that a number of Indians, including the allottees at issue, were competent to manage and control

their own affairs and recommending that the Secretary issue to them patents in fee for their allotments. *Id.* In reliance on the reports, the Secretary prepared the patents in fee, the President signed them, as did the Recorder of the United States General Land Office, and they were recorded in the appropriate books in the General Land Office. *Id.*

The complaint further alleged that the Secretary of the Interior decided to deliver the patents in fee in person. Upon his arrival in Greenwood, South Dakota, on May 12, 1916, the Secretary

> learned that he had been grossly misled as to the competency of such allottees; that they were palpably incompetent to manage and control their respective properties and were not qualified to receive patents in fee; that, while such allottees had been represented to him as competent, some of them were wholly untutored, and each and all of them were without business experience, were incapable of protecting his or her property, or of appreciating its true value, and were easily imposed upon by the craft and design of their more astute white neighbors; and that certain of them . . . before the execution of their respective fee patents in some cases and after such execution in others, but before the time for the delivery of the patents, had been unlawfully, secretly, and surreptitiously imposed upon by white men, and had entered into secret and unlawful agreements for the sale and disposition of their several allotments and had otherwise been duped and defrauded in relation thereto.

Id. at 617. The Secretary of the Interior refused to deliver the patents in fee, took them back to Washington, and ordered them to be marked, " 'Canceled.' " *Id.* The complaint alleged that the commissioners had likewise been misled in their investigation. *Id.*

Relying upon *United States v. Schurz*, 102 U.S. 378, 26 L.Ed. 167 (1880), the Eighth Circuit held that the title of the United States to the lands in controversy was divested at the time of the execution and recording of the patents in fee, that delivery of the patents by the Secretary to the allottees was not necessary to transfer title, and that the title remained in the allottees, notwithstanding the Secretary's attempt to cancel the patents in fee. *Id.* at 619. The court ultimately held that the complaint failed to allege a cause of action because there was no claim of a mistake of law, but only a mistake of fact, and the allegations of fraud were too general because the complaint did not identify who made the misrepresentations to the commissioners and what the misrepresentations were. *Id.* at 620. The record in this case reflects that similar practices occurred through the 1920's such that Indian land holdings drastically declined until Congress passed the Indian Reorganization Act in 1934. 48 Stat. 984, codified as amended at 25 U.S.C. § 461 *et seq.*

As mentioned earlier in this opinion, however, the actions of Congresses after the 1894 Act, which allowed the sales of Indian allotments before the trust period ended, "form a hazardous basis for inferring the intent of an earlier [Congress]." *Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. at 803. Congressional intent not to disestablish the Yankton Sioux Reservation is clear from the 1894 Act,

the 1892 Agreement and the surrounding contemporaneous historical circumstances. The acts of Congress in later years cannot be bootstrapped to the 1894 Act to determine the intent of the 53rd Congress when it ratified the 1892 Agreement.

Even if miscellaneous, subsequent legislation is relevant to show the ultimate consequences of the allotment policy initiated by the Dawes Act, no party or amicus curiae to this consolidated litigation has identified a specific, subsequent act of Congress that expressly and unequivocally disestablished the Yankton Sioux Reservation. By 1934, Congress recognized the utter failure of its allotment policy and the role it played in forcing the Indian tribes into greater poverty and social destruction. That year, Congress passed the Indian Reorganization Act, which again placed primary focus upon reservations in Indian land policy, permitted the exchange of lands held by Indians and non-Indians within reservations in an effort to consolidate tribal lands, and extended indefinitely the trust period on allotted lands.

Since the 1894 Act, Congress has continued to refer to the Yankton Sioux Reservation as a continuing entity, even though the record is replete with contradictory references by federal, state, and county officials and citizens. *See* 41 Stat. 1468 (1920) (authorizing Secretary of Interior to convey to trustees of Yankton Agency Presbyterian Church, by patent in fee, premises situated *within the Yankton Indian Reservation*, county of Charles Mix, State of South Dakota); 47 Stat. 300 (1932) (dividing the United States District Court for the District of South Dakota into four divisions, and providing that "[t]he territory embraced . . . in the counties of Aurora, Beadle, . . .

Charles Mix, . . . Yankton, and *in the Yankton Indian Reservation*, shall constitute the southern division of said district."); Reclamation Projects Authorization and Adjustment Act of 1992, Pub.L. No. 102-575 2005(b) (1992) (approving water project to "irrigate not more than approximately three thousand acres of *Indian-owned land in the Yankton-Sioux Indian Reservation* . . . "). These statutory references, if relevant to the disestablishment question at all, certainly must be construed in favor of the Yankton Sioux Tribe. As the Supreme Court recognized, "the allotment era has long since ended, and its guiding philosophy has been repudiated. Tribal communities struggled but endured, preserved their cultural roots, and remained, for the most part, near their historic lands." *Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. at 805. Repeated congressional recognition in statute of an existing Yankton Sioux Reservation compels this Court to do nothing other than effectuate the "present-day understanding of a 'government-to-government relationship between the United States and [the Yankton Sioux Tribe][.]' " *Id.*

2. Article VIII

The Supreme Court characterized Article VIII of the 1892 Agreement, erroneously denominated Article VII in its opinion, as a provision that "counsels against finding the reservation terminated." *Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. at 801. Article VIII reserved from sale those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes" until "they are no longer required for such purposes." Act at 3.

The Supreme Court observed that in *Solem* it had said "with respect to virtually identical language" that " '[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation.' " *Id.* (quoting *Solem*, 465 U.S. at 474, 104 S.Ct. at 1168).[6] The Supreme Court provided no further analysis of this Article VIII issue, but immediately proceeded to discuss a different Article of the Agreement. Article VIII must nonetheless have continued to trouble the court, for in closing the opinion, it identified "[t]he conflicting understandings about the status of the reservation, together with the fact that the Tribe continues to own land in common," that cautioned it to limit its holding to the narrow issue of diminishment. *Id.* at 805. The court said it "need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly [we] decline to do so. Our holding in *Hagen* was similarly limited, as was the State Supreme Court's

---

[6] Article VIII also provided that, upon ratification, all ceded lands would be offered for sale through the proper land office, "to be disposed of under the existing land laws of the United States, to actual and bona fida settlers only." It is interesting to note that an Armour, South Dakota, bank official, Homer Johnson, wrote to the Secretary of the Interior in 1895, shortly before the Presidential Proclamation opening the lands to settlement, complaining that the State of South Dakota was attempting to file claim to certain of the surplus lands in violation of Article VIII's provision that all claims were to be disposed of under the land laws of the United States. Johnson reported that the South Dakota Constitution forbade the sale of state land for less than $10.00 per acre, and if the State were allowed to file claim, the lands would be unavailable to settlers indefinitely. (Pl. Ex. 56.)

description of the Yankton reservation in . . . *State v. Greger*, 559 N.W.2d [854,] 867 [(SD 1997)]."[7] *Id.*

The Supreme Court's reference to "common ownership" by the Tribe must have referred to the Tribe's recent purchases of lands within the 1858 exterior boundaries that had at some earlier time passed from Indian allotment to non-Indian ownership. The Supreme Court would clearly have understood that it is not correct to refer to an Indian Tribe as "owning" reservation land in common because the right of Indians to their reservations was a right of use and occupancy, with the United States holding title in fee. *Spalding v. Chandler*, 160 U.S. 394, 16 S.Ct. 360, 40 L.Ed. 469 (1896). The right to use and occupancy was as sacred as the fee title of the sovereign. *United States v. Cook*, 86 U.S. 591, 22 L.Ed. 210, 19 Wall. 591 (1873).

Other than the allotments reserved to the Yanktons and held in trust for twenty-five years pending patent in fee, the Yanktons did not themselves reserve in the 1892 Agreement any lands to be held in common by the Tribe,

---

[7] The question of the existence of the Yankton Sioux Reservation has been presented to the South Dakota Supreme Court four times, but it appears that the issue was not fully presented by evidence until *Greger*, when the parties stipulated to incorporate the record that was before this Court in *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, CIV 94-4217. *Greger*, 559 N.W.2d at 859 n.5. As the Supreme Court noted, the South Dakota Supreme Court held in *Greger* that the Yankton Sioux Reservation is diminished to the extent of the ceded lands, as it did in *State v. Thompson*, 355 N.W.2d 349 (S.D. 1984) (using term "disestablished"); *State v. Williamson*, 211 N.W.2d 182 (S.D. 1973) (same); and *Wood v. Jameson*, 130 N.W.2d 95 (S.D. 1964) (same).

but agreed that the United States would reserve from sale to settlers some of the ceded lands to be used for agency, school and other purposes to benefit the Tribe. The reservation of lands by the United States for the benefit of the Tribe was virtually equivalent, under the law, to reservation for the use and occupancy of the Tribe.

Following ratification of the 1892 Agreement, the United States reserved 1,252.89 acres for agency, church, and school purposes pursuant to Article VIII of the Agreement.[8] (Pl. Ex. 11.) As noted by the Supreme Court, there is some acreage within the original 1858 boundaries that has reverted to commonly held tribal or trust land. *Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. at 804. In the late 1920's, the United States returned to the control of the Yankton Sioux Tribe some of the lands reserved in the 1892 Agreement for school purposes because they were no longer needed. (Gov't. Ex. 13.) That land, as well as other parcels the Tribe has purchased in recent years are controlled by the Tribe in common. The record reflects that the Tribe recently has applied to the Secretary of the Interior to take into trust certain lands purchased by the Tribe within the original 1858 exterior boundaries, and that the proceeds of the Fort Randall Casino owned and operated by the Tribe will facilitate the purchase of additional lands by the Tribe in the future. This evidence of

---

[8] When the Commissioner of Indian Affairs wrote his instructions to the Yankton Commission on July 27, 1892, 852 acres had been reserved for government purposes. Instructions to the Yankton Indian Commission (reprinted in U.S. Supreme Court Joint Appendix at 99.)

tribal control of lands within the 1858 boundaries confirms what the Supreme Court suspected: Article VIII counsels against finding the reservation terminated.

3. Articles XVII and XVIII

Finally, two other Articles of the 1892 Agreement, Article XVII, the liquor provision, and Article XVIII, the savings clause, merit discussion as supporting the conclusion that a diminished reservation remained intact. Article XVII provided (emphasis added):

> No intoxicating liquors nor other intoxicants *shall ever* be sold or given away upon any of the lands by this agreement ceded and sold to the United States, *nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858,* and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

In the 1894 Act, Congress set the penalty for violation of Article XVII, which it ratified as written, at imprisonment for not more than two years and a fine of not more than $300. Act at 7. The Supreme Court agreed with the State that the most reasonable inference from the inclusion of this provision was that Congress was aware the opened, unallotted areas would, in the future, not be "Indian Country," and from this, the Supreme Court discerned an intent to diminish the reservation to the extent of the ceded lands. *Yankton Sioux Tribe,* ___ U.S. ___, 118 S.Ct. at 801. Furthermore, the court said, the Commissioner of

Indian Affairs described the provision as prohibiting " 'the sale or disposition of intoxicants upon any of the lands *now* within the Yankton Reservation,' . . . indicating that the lands *would be severed from the reservation* upon ratification of the agreement." *Id.* (emphasis added). The court reaffirmed its prior implication of diminishment, but not disestablishment, of the Yankton Sioux Reservation in *Perrin v. United States*, 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691 (1914), when it said in *Yankton Sioux Tribe* that Article XVII applied to ceded lands formerly included in the Yankton Sioux Reservation. *Id.* Thus, the Supreme Court itself noted a jurisdictional distinction between the ceded lands, which were severed from the reservation, and the allotted lands, which remained in reservation status.

The inclusion of Article XVII in the 1892 Agreement supports the view that the reservation was not disestablished. Congress outlawed the sale of intoxicating liquor in Indian Country on July 23, 1892. 27 Stat. 260. The Yankton Commissioners conducted the negotiations with the Yankton Sioux for the sale of surplus lands shortly thereafter in the fall of 1892, and there is no indication in the Commissioners' reports that either party was aware of the liquor statute when the Agreement was reached. The liquor provision was included in the list of propositions presented by the Tribe, and Article XVII as drafted and ratified prohibited liquor forever upon the ceded lands *and* upon "any other lands within or comprising the reservations of the Yankton Sioux." Had Congress intended to disestablish the reservation, Congress would have wanted to make clear that the 1892 liquor law did not apply to the Indian allotments or the ceded lands, as

neither would remain "Indian Country" if the reservation were disestablished. Congress instead ratified Article XVII, and by approving the Article, evidenced its intent to preserve the reservation status of the allotted lands.

In 1916, the Eighth Circuit considered an appeal from a federal criminal conviction for the sale of intoxicating liquor on the lands *ceded* by the 1894 Act. *Cihak v. United States*, 232 F. 551 (8th Cir. 1916). The appeals court cited Article XVII of the 1892 Agreement as the basis for the federal prosecution, noting that the defendant "was indicted, tried, convicted, and sentenced for selling intoxicating liquors *upon the portion of this reservation ceded to the United States*." *Id.* at 552 (emphasis added). The court reversed for a new trial only because of evidentiary error. *Id.* at 554-55. Thus, even in 1916, the Eighth Circuit recognized that the Yankton Sioux Reservation existed and that only a portion of it had been ceded. After 1894, there was not an act of Congress that changed the reservation status of the allotted lands, and state or private conduct directed to the lands in question is not sufficient to cause such a change. *See Seymour*, 368 U.S. at 354, 82 S.Ct. at 426.

Article XVIII, the savings clause, was the fulcrum of the previous *Yankton Sioux Tribe* litigation. Despite the fact that the first sentence of Article XVIII expressly stated the non-abrogation of the 1858 Treaty and the second sentence recognized the continuing "full force and effect" of the 1858 Treaty, the Supreme Court rejected the view of this Court and the Eighth Circuit that the savings clause existed for any other reason than to assure the Yanktons that they would continue to receive their annuities under the 1858 Treaty. *Yankton Sioux Tribe*, ___ U.S.

___, 118 S.Ct. at 800. The Supreme Court also ruled, in rejecting an argument of the United States, that it was not persuaded to "view the savings clause *as an agreement to maintain exclusive tribal governance within the original reservation boundaries.*" *Id.* at 800 (emphasis added). Having reached the conclusion that Articles I and II of the Agreement were precisely suited to terminating reservation status of the ceded lands, it makes sense that the Supreme Court would not interpret the savings clause as an agreement to maintain the Tribe's *exclusive* tribal governance *over the ceded lands*. The court did not comment at all upon whether it would interpret the savings clause as an agreement to maintain tribal governance over the allotted lands within the original reservation boundaries. This Court concludes that the savings clause, even if limited only to the matter of preserving the Tribe's annuities under the 1858 Treaty, creates an inference that Congress contemplated that the Tribe would continue as a political entity even after the ratification of the 1892 Agreement, that its members would continue to receive the annuity benefits promised them for fifty years under the 1858 Treaty, and that tribal self-governance during the trust period was consistent with the continuation of reservation status of the allotted lands.

4. The Legislative History

Much of the legislative history of the 1894 Act already has been discussed. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 26 (1894); (Pl. Ex. 5.) (hereafter "Legislative History"). The letters of Secretary of the Interior Hoke Smith and Acting Commissioner of Indian Affairs

Frank C. Armstrong transmitting the Agreement to Congress contain no indications that the Agreement expressly disestablished the reservation or that they had any reason to believe that disestablishment would occur. To the contrary, Acting Commissioner Armstrong flatly told Congress that the "treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof." Legislative History at 5. Thus, Congress knew, both from Armstrong's statement and from the extensive reports of the Yankton Commissioners, that the Yanktons had not expressly consented to the relinquishment of their entire reservation, and as already shown, Congress accepted and ratified that position in the 1894 Act.

Without doubt, parts of the legislative history suggest that Congress believed the allotment of land in severalty to individual Indians would curtail "[o]ne of the greatest hindrances to the progress of these people[, which] has been their tribal mode of life and ownership of land in common, and the issue of food and clothing [given] to them by the Government." By providing "each member of the tribe a home in his own right[,]" and bringing in the "frugal, moral, and industrious" white settlers to work beside the Indians, Congress hoped to "stimulate individual effort and make their progress much more rapid than before." (Pl. Ex. 7, State Ex. 608.) Such sentiments echo the resolution of Senator Dawes and the Forty-Ninth Congress of 1887 to assimilate the Yanktons into white culture, but these comments are passing references, and they do not overcome the strong textual and contemporaneous evidence set out in this

opinion establishing that the Yanktons' allotted lands retained reservation status.

III. Treatment of the Yankton Sioux Reservation after 1894

In *Yankton Sioux Tribe*, the Supreme Court, recognizing that the 1894 Act was "not so compelling that, standing alone, it would indicate diminishment," turned to subsequent congressional and administrative references to the reservation and demographic trends to support its conclusion that de facto diminishment had occurred. *Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. at 802-05. Even then, the court observed that the conflicting evidence was of limited interpretative value. *Id.*, ___ U.S. ___, 118 S.Ct. at 804. In the *DeCoteau* disestablishment decision, the Supreme Court devoted only two paragraphs to mention of the jurisdictional history subsequent to the 1891 surplus land act, and focused its analysis entirely upon deciding whether a congressional intent to terminate the reservation was expressed on the face of the 1891 Act or was clear from the surrounding circumstances and legislative history. *DeCoteau*, 420 U.S. at 442-43, 95 S.Ct. at 1092. The *DeCoteau* approach is the one the Court has taken in this opinion, because *DeCoteau* does not place any emphasis on "de facto disestablishment," if there is such a thing, in a manner similar to the Supreme Court's diminishment cases.

The complete evidentiary record now before the Court contains scores of historical documents, cases, deeds, affidavits, and testimony from which no clear

picture emerges as to a consistent treatment of the Yankton Sioux Reservation following passage of the 1894 Act. From the time of the Proclamation of President Grover Cleveland in 1895 opening the ceded lands of the Yankton Sioux Reservation for white settlement until today, the question of jurisdiction has presented a complicated puzzle, and the hope of many that the Supreme Court's decision would solve the puzzle once and for all did not come to fruition.

The evidence before the Court shows that, at various times, and for different reasons, some political, some fiscal, and some racial, the Yankton Sioux Tribe, the United States, the State of South Dakota, Charles Mix County, and the amicus curiae municipalities have exercised jurisdiction within the original exterior boundaries of the reservation. Much of this evidence was reviewed in the Court's previous opinion in *Yankton Sioux Tribe*, 890 F.Supp. at 887-88, but more evidence was admitted in this phase of the litigation. Each political entity points to the evidence establishing its exercise of jurisdiction to support its view as to whether the reservation is disestablished or not.

Thus, the Tribe emphasizes evidence that it has in the past and today maintains a tribal police force and tribal courts, that the Tribe governs itself through a Tribal Code, and that the Yankton Sioux Constitution, as amended in 1990, claims tribal jurisdiction extending to the original exterior 1858 boundaries. (Gov't. Exs. 1-2.) The State points to its law enforcement presence, the criminal and civil cases prosecuted in its courts, its exercise of jurisdiction over environmental matters, and the maps and various references indicating a former Yankton Sioux

Reservation. Charles Mix County and the cities remind the Court of their vested interest in the lands at issue and their exercise of criminal and civil jurisdiction, including taxation. They point out that the Charles Mix county seat, as well as law enforcement and court facilities, lie on former allotted lands. They emphasize the justifiable expectations of the people living in Charles Mix County. The United States, like the State, highlights its law enforcement presence on the reservation immediately after the ratification of the 1892 Agreement and its long-standing involvement in the affairs of the Tribe.

The fact that any one of these political entities has exercised or continues to exercise any form of jurisdiction within the original exterior boundaries of the Yankton Sioux Reservation is only minimally helpful to the Court in determining whether such exercise of jurisdiction was or is proper under the law. In this opinion, the Court has reached a legal conclusion, based upon the 1892 Agreement, the text of the 1894 Act, its legislative history, and the circumstances surrounding the negotiations for the sale of surplus lands, that the reservation is not disestablished.

IV. The *DeCoteau* Result Does Not Control This Case

It is important to explain why the Court believes that the *DeCoteau* result does not control the outcome in this case. The most obvious reason is that, had *DeCoteau* controlled this case, the Supreme Court would have applied it to grant the State the relief it sought: disestablishment of the Yankton Sioux Reservation. The Supreme Court did not do so and instead signaled some concern about

whether the reservation continued to exist. Throughout its opinion, the Supreme Court agreed with the broad concepts expressed in *DeCoteau*, but ultimately applied them to terminate only the reservation status of the Yanktons' ceded lands. *Yankton Sioux Tribe*, ___ U.S. at ___, 118 S.Ct. at 801.

DeCoteau is factually distinguishable from the case before the Court. In reviewing the historical context that led to the sale of all of the surplus lands in the Lake Traverse Reservation, the Supreme Court emphasized that very early on, the spokesman for the Sisseton-Wahpeton Sioux Tribe stated in the local press that "[w]e never thought to keep this reservation for our lifetime. . . . The Indians have taken their land in severalty. They are waiting for patents. The Indians are anxious to get patents. We are willing the surplus land should be sold. We don't expect to keep reservation. . . . When the reservation is open we meet as one body. We be as one." *DeCoteau*, 420 U.S. at 433, 95 S.Ct. at 1087.

The negotiations between the Commissioners and the Sisseton-Wahpeton Tribe for the sale of the surplus lands took two weeks and the *DeCoteau* opinion does not mention any disagreement that occurred among the members of the Tribe in deciding to sell their lands or any opposition registered to the agreement at all. The Indians wished to sell outright all of their surplus lands on three conditions: that each tribal member, regardless of age or sex, receive an allotment of 160 acres, that Congress settle their loyal scout claim, and that an adequate sales price per acre be paid for all of the unallotted land. *Id.*, 420 U.S. at 434, 95 S.Ct. at 1088. The agreement departed from the strict provisions of the Dawes Act because it gave the

Indians a large number of allotments, each member of the Tribe receiving 160 acres regardless of age or sex, as requested by the Tribe. This approach provided the Sissetons with far more allotted land per capita than the Yanktons, for whom only heads of families received 160 acres pursuant to the Dawes Act. *Id.* 420 U.S. at 434 n.16, 95 S.Ct. at 1088 n.16.

The Sissetons declined to reserve other portions of the reservation for future allotments and tracts then occupied by the government for agency, school, and missionary purposes because they knew some of the principal and interest from the sale of surplus lands would be used for such purposes, and they did not think it would be proper for them to also reserve a large quantity of land for such purposes. *Id.* The Sissetons stated during negotiations that they did not care to have an agency after the surplus lands were sold, and "[t]his little reservation is ours, and all we have left. There is nothing in our treaty that says that we must sell. It was given us as a permanent home, but now we have decided to sell[.]" *Id.* Thus, the Sissetons expressed their understanding that they would not retain a reservation after the sale of the surplus lands.

The Sisseton and Yankton Agreements are dissimilar in significant ways. In the Sissetons' agreement, there were no counterparts to Articles V, VIII, XI, XVII, and XVIII found in the Yanktons' Agreement.

The legislative history of the Sissetons' agreement shows that Congress had a much different understanding about the future of the Lake Traverse Reservation upon ratification of that agreement than it had regarding the

Yankton Sioux Reservation. The report of the Senate Committee on Indian Affairs recognized that each Sisseton would receive 160 acres, a departure from the allotment act, but nonetheless recommended ratification in light of the fact "that the additional allotments are *in lieu of any residue* which, under their title, these Indians could have reserved for the future benefit of their families, and the further fact that they are soon to assume the responsibilities of citizenship[.]" *Id.*, 420 U.S. at 438-39 n.19, 95 S.Ct. at 1089-90 n.19 (emphasis added). The report further explained that the reservation contained 918,780 acres, 127,887 of which had been allotted to the Indians under the Dawes Act. The additional allotments allowed by Article 4 of the agreement required 112,113 more acres, for a total of 240,002 in allotments "which [left] a surplus, *including the lands occupied by the agency and missionary societies,* of 678,778 acres, *the Indian title to which [was] extinguished by the terms of the agreement. Id.* (emphasis added).

Such an explicit statement of congressional intent to extinguish Indian title to reservation lands cannot be found in the legislative history of the Yanktons' agreement. Moreover, the Sissetons relinquished far more acreage for settlement by non-Indians than they retained for themselves, as compared to the Yanktons who, overall, retained greater acreage for their allotments than they ceded for sale as surplus lands. Congress must have known, when it ratified the Sissetons' agreement in 1891, that the opened area would be settled by more non-Indians than Indians and that truly, the Indian character of the area would be forever changed. Three years later,

when Congress ratified the Yanktons' Agreement reserving a larger portion of the reservation for the Indians' allotments, and reserving land for agency, school, and religious purposes, Congress must have known that the introduction of white settlers would change the Indian character of the Yankton Sioux Reservation to a degree, but not so dramatically as the Lake Traverse Reservation.

As the Eighth Circuit observed in its prior opinion, *DeCoteau* established that only 3,000 of 33,000 people, or nine percent, living within the original exterior boundaries of the Lake Traverse Reservation at the time *DeCoteau* was decided were Indians, while using the lower of two conflicting population figures in this record, thirty-two percent of the population within the original exterior boundaries of the Yankton Sioux Reservation is Indian. *Yankton Sioux Tribe*, 99 F.3d at 1457 & n.26. The recent evidence introduced into the record shows that the population of Indians living on and adjacent to the Yankton Sioux Reservation has increased during the 1990's. (Gov't. Exs. 5a-c.) Moreover, the Bureau of Indian Affairs Superintendent at the Yankton Agency, Timothy Lake, testified that, in addition to the Indian students who attend the Marty Indian School, 176 Indian students attend the Lake Andes public elementary school as compared with 72 white students, and 225 Indian students attend the Wagner public elementary school as compared to 227 white students.

In *DeCoteau*, the Supreme Court emphasized that the Sisseton-Wahpeton Sioux Tribe did not establish a tribal court or legal code to exercise the jurisdiction which the Tribe claimed in a 1966 tribal constitution to extend to lands lying within the original reservation boundaries.

The evidence in this case shows a tribal court operated before and after the 1894 Act and that the Yankton Sioux Tribe has adopted a legal code to exercise the jurisdiction it claims to govern its own people within the original 1858 exterior boundaries.

Under the facts presented in *DeCoteau*, it is understandable that the Supreme Court held the reservation was disestablished by the 1891 Act because that was the precise understanding held by the Sisseton-Wahpeton Tribe itself. In light of the far different facts presented by the Yankton Agreement, it is clear why the Supreme Court did not apply *DeCoteau* to hold the Yankton Sioux Reservation disestablished. In this opinion, this Court has exhaustively enumerated many reasons, based upon the strong textual and contemporaneous evidence, why the Yankton Sioux Reservation was not disestablished, and certainly, this Court will not apply the *DeCoteau* result to hold that the Yankton Sioux Reservation is disestablished.

V. Conclusion

The result of the Supreme Court's diminishment decision and this Court's determination in this opinion that the Yankton Sioux Reservation is not disestablished is a checkerboard pattern of jurisdiction on the reservation. The Court's decision, however, produces a stable, unchanging allocation of jurisdiction. *See Ute Indian Tribe*, 114 F.3d at 1530. The Yankton Sioux Tribe and the federal government exercise primary criminal and civil jurisdiction in "Indian Country," that is, the lands within the original exterior 1858 Treaty boundaries that are or were Indian allotments or lands reserved for agency purposes,

even though some of those lands may now have passed into fee status. *See Alaska v. Native Village of Venetie Tribal Gov't*, ___ U.S. ___, 118 S.Ct. 948, 952 & n.1, 140 L.Ed.2d 30 (1998); *DeCoteau*, 420 U.S. at 427 n.2, 95 S.Ct. at 1084 n.2. "Indian Country" also includes rights-of-way running through the allotted and reserved areas which constitute the diminished reservation. 18 U.S.C. § 1151(a); *DeCoteau*, 420 U.S. at 427 n.2, 95 S.Ct. at 1084 n.2. Even in "Indian Country," the State may have jurisdiction over some persons or types of conduct, but such jurisdiction is quite limited. *See DeCoteau*, 420 U.S. at 427 n.2, 95 S.Ct. at 1084 n.2 (and cases cited therein). As stated in *Yankton Sioux Tribe*, ___ U.S. at ___, 118 S.Ct. at 797-98, state and local governments exercise primary criminal and civil jurisdiction over the ceded lands opened to settlement on the Yankton Sioux Reservation as a result of the 1894 Act of Congress. Although some title searches may be necessary to determine conclusively which lands were ceded under the 1894 Act, once the status of the lands is determined, the allocation of jurisdiction can be determined and jurisdiction likely will not change in the future as lands are bought and sold. *See Ute Indian Tribe*, 114 F.3d at 1530. Lands purchased by the Tribe and taken into trust by the federal government pursuant to 25 U.S.C. § 465, however, even if such lands lie within the ceded areas of the reservation, are subject to tribal and federal jurisdiction. *See Cass County*, ___ U.S. ___, 118 S.Ct. at 1910.

With the interests of all parties carefully in mind, the Court reaches the decision warranted by law. It is incumbent upon the Yankton Sioux Tribe, the United States, the State of South Dakota, Charles Mix County, and the affected municipalities, as well as each individual who

resides within the affected area, to foster a spirit of communication, cooperation, and compromise in order to accommodate, as far as possible, each of the legitimate governmental, economic, social, political, and legal interests that are at stake. For all of the reasons stated,

IT IS ORDERED:

(1) that, in *Yankton Sioux Tribe v. Gaffey*, CIV 98-4042, the Court enters a declaratory judgment in favor of the plaintiffs Yankton Sioux Tribe and its individual members and in favor of the plaintiff-intervenor United States of America and against the defendants Matt Gaffey, Herman Peters, Bruce Bakken, Jack Soulek, William Janklow, and Mark Barnett holding that the 53rd Congress did not disestablish the Yankton Sioux Reservation in 1894 when it ratified the 1892 Agreement with the Yankton Sioux Tribe for the sale of surplus lands.

(2) that, in *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, CIV 94-4217, the Court enters a declaratory judgment in favor of the plaintiffs Yankton Sioux Tribe and Darrell Drapeau individually, and against the third-party defendant, State of South Dakota, holding that the 53rd Congress did not disestablish the Yankton Sioux Reservation in 1894 when it ratified the 1892 Agreement with the Yankton Sioux Tribe for the sale of surplus lands.

(3) that, in *Yankton Sioux Tribe v. Gaffey*, CIV 98-4042, the Court dismisses with prejudice the counterclaims of the state defendants, William Janklow and Mark Barnett, and the county defendants, Matt Gaffey, Herman Peters, Bruce Bakken, and Jack Soulek against the plaintiffs

Yankton Sioux Tribe and its individual members and the plaintiff-intervenor United States.

(4) that the Yankton Sioux Reservation, diminished by the 1894 Act only to the extent of the ceded lands, includes all of the lands within the original exterior reservation boundaries established by the 1858 Treaty with the Yankton Sioux Tribe that were later allotted to the Yanktons, as well as the lands reserved from sale for agency, school, and other tribal purposes in the 1892 Agreement.

(5) that the Yankton Sioux Reservation, as described in the preceding paragraph, is "Indian Country" within the meaning of 18 U.S.C. § 1151(a).

(6) that the Court enters a permanent injunction in favor of the Yankton Sioux Tribe, its individual members, and the United States enjoining William Janklow and Mark Barnett, in their official capacities as Governor and Attorney General of the State of South Dakota, and their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with them, from exercising criminal law enforcement jurisdiction over members of the Yankton Sioux Tribe who are alleged to have committed crimes on allotted or reserved lands, notwithstanding any patent, and including rights-of-way running through the Yankton Sioux Reservation as described in paragraph 4.

(7) that the Court enters a permanent injunction in favor of the Yankton Sioux Tribe, its individual members, and the United States enjoining Matt Gaffey, States Attorney of Charles Mix County, and Herman Peters, Bruce Bakken, and Jack Soulek, members of the

Charles Mix County Commission, in their official capacities, and their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with them, from exercising criminal law enforcement jurisdiction over members of the Yankton Sioux Tribe who are alleged to have committed crimes on allotted or reserved lands, notwithstanding any patent, and including rights-of-way running through the Yankton Sioux Reservation as described in paragraph 4.

(8) that all parties will bear their own attorney's fees and costs.

Dated this 14th day of August, 1998.

BY THE COURT:

/s/ Lawrence L. Piersol
Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: /s/ Linda M. Ziegler
(SEAL) DEPUTY

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3893/3894/3896/3900SDSF

Yankton Sioux Tribe, and its individual members;	*	Order Denying
	*	Petition for
	*	Rehearing and
Appellee,	*	for Rehearing En
United States of America, on its own behalf and for the benefit of Yankton Sioux Tribe,	*	Banc
	*	
	*	
Appellee,	*	
	*	
v.	*	
	*	
Matt Gaffey, William Janklow, State of South Dakota, and Southern Missouri Waste, et al,	*	
	*	
	*	
Appellants.	*	

The petitions for rehearing en banc are denied. Judge Beam and Judge Loken would grant the petitions and Chief Judge Wollman would grant the petitions for rehearing en banc filed by the State of South Dakota, the Southern Waste Management District, and Charles Mix County.

The petitions for rehearing by the panel are also denied.

(5128-010199)

December 8, 1999

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

TREATY WITH THE YANKTON SIOUX, 1858

Articles of agreement and convention made and concluded at the city of Washington, this nineteenth day of April, A.D. one thousand eight hundred and fifty-eight, by Charles E. Mix, commissioner on the part of the United States, and the following-named chiefs and delegates of the Yancton tribe of Sioux or Dacotah Indians, viz:

Pa-la-ne-a-pa-pe, the man that was struck by the Ree.
Ma-to-sa-be-che-a, the smutty bear.
Charles F. Picotte, Eta-ke-cha.
Ta-ton-ka-wete-co, the crazy bull.
Pse-cha-wa-kea, the jumping thunder.
Ma-ra-ha-ton, the iron horn.
Mombe-kah-pah, one that knocks down two.
Ta-ton-ka-e-yah-ka, the fast bull.
A-ha-ka-ma-ne, the walking elk.
A-ha-ka-na-zhe, the standing elk.
A-ha-ka-ho-che-cha, the elk with a bad voice.
Cha-ton-wo-ka-pa, the grabbing hawk.
E-ha-we-cha-sha, the owl man.
Pla-son-wa-kan-na-ge, the white medicine cow that stands.
Ma-ga-scha-che-ka, the little white swan.
Oke-che-la-wash-ta, the pretty boy.

(The three last names signed by their duly-authorized agent and representative, Charles F. Picotte,) they being thereto duly authorized and empowered by said tribe of Indians.

ARTICLE 1.

The said chiefs and delegates of said tribe of Indians do hereby cede and relinquish to the United States all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof, situated and described as follows, to wit – Beginning at the mouth of the Naw-izi-wa-koo-pah or Chouteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres. They, also, hereby relinquish and abandon all claims and complaints about or growing out of any and all treaties heretofore made by them or other Indians, except their annuity rights under the treaty of Laramie, of September 17, A.D. 1851.

ARTICLE 2.

The land so ceded and relinquished by the said chiefs and delegates of the said tribe of Yanctons is and shall be known and described as follows, to wit –

"Beginning at the mouth of the Tchan-kas-an-data or Calumet or Big Sioux River; thence up the Missouri River to the mouth of the Pa-hah-wa-kan or East Medicine Knoll River; thence up said river to its head; thence in a direction to the head of the main fork of the Wan-dush-kah-for or Snake River; thence down said river to its junction with the Tchan-san-san or Jaques or James River; thence in a direct line to the northern point of Lake Kampeska; thence along the northern shore of said lake

and its outlet to the junction of said outlet with the said Big Sioux River; thence down the Big Sioux River to its junction with the Missouri River."

And they also cede and relinquish to the United States all their right and title to and in all the islands of the Missouri River, from the mouth of the Big Sioux to the mouth of the Medicine Knoll River.

And the said chiefs and delegates hereby stipulate and agree that all the lands embraced in said limits are their own, and that they have full and exclusive right to cede and relinquish the same to the United States.

ARTICLE 3.

The said chiefs and delegates hereby further stipulate and agree that the United States may construct and use such roads as may be hereafter necessary across their said reservation by the consent and permission of the Secretary of the Interior, and by first paying the said Indians all damages and the fair value of the land so used for said road or roads, which said damages and value shall be determined in such manner as the Secretary of the Interior may direct. And the said Yanctons hereby agree to remove and settle and reside on said reservation within one year from this date, and, until they do so remove, (if within said year,) the United States guarantee them in the quiet and undisturbed possession of their present settlements.

ARTICLE 4.

In consideration of the foregoing cession, relinquishment, and agreements, the United States do hereby agree and stipulate as follows, to wit:

1st. To protect the said Yanctons in the quiet and peaceable possession of the said tract of four hundred thousand acres of land so reserved for their future home, and also their persons and property thereon during good behavior on their part.

2d. To pay to them, or expend for their benefit, the sum of sixty-five thousand dollars per annum, for ten years, commencing with the year in which they shall remove to, and settle and reside upon, their said reservation – forty thousand dollars per annum for and during ten years thereafter – twenty-five thousand dollars per annum for and during ten years thereafter – and fifteen thousand dollars per annum for and during twenty years thereafter; making one million and six hundred thousand dollars in annuities in the period of fifty years, of which sums the President of the United States shall, from time to time, determine what proportion shall be paid to said Indians, in cash, and what proportion shall be expended for their benefit, and, also, in what manner and for what objects such expenditure shall be made, due regard being had in making such determination to the best interests of said Indians. He shall likewise exercise the power to make such provision out of said sums as he may deem to be necessary and proper for the support and comfort of the aged or infirm, and helpless orphans of the said Indians. In case of any material decrease of said Indians, in number, the said amounts may, in the discretion of the

President of the United States, be diminished and reduced in proportion thereto – or they may, at the discretion of the President of the United States, be discontinued entirely, should said Indians fail to make reasonable and satisfactory efforts to advance and improve their condition, in which case, such other provisions shall be made for them as the President and Congress may judge to be suitable and proper.

3d. In addition to the foregoing sum of one million and six hundred thousand dollars as annuities, to be paid to or expended for the benefit of said Indians, during the period of fifty years, as before stated, the United States hereby stipulate and agree to expend for their benefit the sum of fifty thousand dollars more, as follows, to wit: Twenty-five thousand dollars in maintaining and subsisting the said Indians during the first year after their removal to and permanent settlement upon their said reservation; in the purchase of stock, agricultural implements, or other articles of a beneficial character, and in breaking up and fencing land; in the erection of houses, storehouses, or other needful buildings, or in making such other improvements as may be necessary for their comfort and welfare.

4th. To expend ten thousand dollars to build a school-house or school-houses, and to establish and maintain one or more normal-labor schools (so far as said sum will go) for the education and training of the children of said Indians in letters, agriculture, the mechanic arts, and housewifery, which school or schools shall be managed and conducted in such manner as the Secretary of the Interior shall direct. The said Indians hereby stipulating to keep constantly thereat, during at least nine

months in the year, all their children between the ages of seven and eighteen years; and if any of the parents, or others having the care of children, shall refuse or neglect to send them to school, such parts of their annuities as the Secretary of the Interior may direct, shall be withheld from them and applied as he may deem just and proper; and such further sum, in addition to the said ten thousand dollars, as shall be deemed necessary and proper by the President of the United States, shall be reserved and taken from their said annuities, and applied annually, during the pleasure of the President to the support of said schools, and to furnish said Indians with assistance and aid and instruction in agricultural and mechanical pursuits, including the working of the mills, hereafter mentioned, as the Secretary of the Interior may consider necessary and advantageous for said Indians; and all instruction in reading shall be in the English language. And the said Indians hereby stipulate to furnish, from amongst themselves, the number of young men that may be required as apprentices and assistants in the mills and mechanic shops, and at least three persons to work constantly with each white laborer employed for them in agriculture and mechanical pursuits, it being understood that such white laborers and assistants as may be so employed are thus employed more for the instruction of the said Indians than merely to work for their benefit; and that the laborers so to be furnished by the Indians may be allowed a fair and just compensation for their services, to be fixed by the Secretary of the Interior, and to be paid out of the shares of annuity of such Indians as are able to work, but refuse or neglect to do so. And whenever the President of the United States shall become

satisfied of a failure, on the part of said Indians, to fulfil the aforesaid stipulations, he may, at his discretion, discontinue the allowance and expenditure of the sums so provided and set apart for said school or schools, and assistance and instruction.

5th. To provide the said Indians with a mill suitable for grinding grain and sawing timber; one or more mechanic shops, with the necessary tools for the same; and dwelling-houses for an interpreter, miller, engineer for the mill, (if one be necessary,) a farmer, and the mechanics that may be employed for their benefit, and to expend therefor a sum not exceeding fifteen thousand dollars.

ARTICLE 5.

Said Indians further stipulate and bind themselves to prevent any of the members of their tribe from destroying or injuring the said houses, shops, mills, machinery, stock, farming-utensils, or any other thing furnished them by the Government, and in case of any such destruction or injury of any of the things so furnished, or their being carried off by any member or members of their tribe, the value of the same shall be deducted from their general annuity; and whenever the Secretary of the Interior shall be satisfied that said Indians hae become sufficiently confirmed in habits of industry and advanced in the acquisition of a practical knowledge of agriculture and the mechanic arts to provide for themselves, he may, at his discretion, cause to be turned over to them all of the said houses and other property furnished them by the United States, and dispense with the services of any or all

persons hereinbefore stipulated to be employed for their benefit, assistance, and instruction.

ARTICLE 6.

It is hereby agreed and understood that the chiefs and headmen of said tribe may, at their discretion, in open council, authorize to be paid out of their said annuities such a sum or sums as may be found to be necessary and proper, not exceeding in the aggregate one hundred and fifty thousand dollars, to satisfy their just debts and obligations, and to provide for such of their half-breed relations as do not live with them, or draw any part of the said annuities of said Indians: Provided, however, That their said determinations shall be approved by their agent for the time being, and the said payments authorized by the Secretary of the Interior: Provided, also, That there shall not be so paid out of their said annuities in any one year, a sum exceeding fifteen thousand dollars.

ARTICLE 7.

On account of their valuable services and liberality to the Yanctons, there shall be granted in fee to Charles F. Picotte and Zephyr Rencontre, each, one section of six hundred and forty acres of land, and to Paul Dorian one-half a section; and to the half-breed Yancton, wife of Charles Reulo, and her two sisters, the wives of Eli Bedaud and Augustus Traverse, and to Louis Le Count, each, one-half a section. The said grants shall be selected in said ceded territory, and shall not be within said reservation, nor shall they interfere in any way with the improvements of such persons as are on the lands ceded

above by authority of law; and all other persons (other than Indians, or mixed-bloods) who are now residing within said ceded country, by authority of law, shall have the privilege of entering one hundred and sixty acres thereof, to include each of their residences or improvements, at the rate of one dollar and twenty-five cents per acre.

ARTICLE 8.

The said Yancton Indians shall be secured in the free and unrestricted use of the red pipe-stone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire.

ARTICLE 9.

The United States shall have the right to establish and maintain such military posts, roads, and Indian agencies as may be deemed necessary within the tract of country herein reserved for the use of the Yanctons; but no greater quantity of land or timber shall be used for said purposes than shall be actually requisite; and if, in the establishment or maintenance of such posts, roads, and agencies, the property of any Yancton shall be taken, injured, or destroyed, just and adequate compensation shall be made therefor by the United States.

ARTICLE 10.

No white person, unless in the employment of the United States, or duly licensed to trade with the Yanctons, or members of the families of such persons, shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians, nor shall said Indians alienate, sell, or in any manner dispose of any portion thereof, except to the United States. Whenever the Secretary of the Interior shall direct, said tract shall be surveyed and divided as he shall think proper among said Indians, so as to give to each head of a family or single person a separate farm, with such rights of possession or transfer to any other member of the tribe or of descent to their heirs and representatives as he may deem just.

ARTICLE 11.

The Yanctons acknowledge their dependence upon the Government of the United States, and do hereby pledge and bind themselves to preserve friendly relations with the citizens thereof, and to commit no injuries or depredations on their persons or property, nor on those of members of any other tribe or nation of Indians; and in case of any such injuries or depredations by said Yanctons, full compensation shall, as far as possible, be made therefor out of their tribal annuities, the amount in all cases to be determined by the Secretary of the Interior. They further pledge themselves not to engage in hostilities with any other tribe or nation, unless in self-defence, but to submit, through their agent, all matters of dispute and difficulty between themselves and other Indians for

the decision of the President of the United States, and to acquiesce in and abide thereby. They also agree to deliver, to the proper officer of the United States all offenders against the treaties, laws, or regulations of the United States, and to assist in discovering, pursuing, and capturing all such offenders, who may be within the limits of their reservation, whenever required to do so by such officer.

ARTICLE 12.

To aid in preventing the evils of intemperance, it is hereby stipulated that if any of the Yanctons shall drink, or procure for others, intoxicating liquor, their proportion of the tribal annuities shall be withheld from them for at least one year; and for a violation of any of the stipulations of this agreement on the part of the Yanctons they shall be liable to have their annuities withheld, in whole or in part, and for such length of time as the President of the United States shall direct.

ARTICLE 13.

No part of the annuities of the Yanctons shall be taken to pay any debts, claims, or demands against them, except such existing claims and demands as have been herein provided for, and except such as may arise under this agreement, or under the trade and intercourse laws of the United States.

ARTICLE 14.

The said Yanctons do hereby fully acquit and release the United States from all demands against them on the part of said tribe, or any individual thereof, except the beforementioned right of the Yanctons to receive an annuity under said treaty of Laramie, and except, also, such as are herein stipulated and provided for.

ARTICLE 15.

For the special benefit of the Yanctons, parties to this agreement, the United States agree to appoint an agent for them, who shall reside on their said reservation, and shall have set apart for his sole use and occupation, at such a point as the Secretary of the Interior may direct, one hundred and sixty acres of land.

ARTICLE 16.

All the expenses of the making of this agreement, and of surveying the said Yancton reservation, and of surveying and marking said pipe-stone quarry, shall be paid by the United States.

ARTICLE 17.

This instrument shall take effect and be obligatory upon the contracting parties whenever ratified by the Senate and the President of the United States.

Source: April 19, 1858, 11 Stat 743;
Ratified February 16, 1859;
Proclamation February 26, 1859.

AGREEMENT WITH THE YANKTON SIOUX OR DAKOTA INDIANS, IN SOUTH DAKOTA

Sec. 12. The following agreement, made by J.C. Adams and John J. Cole, commissioners on the part of the United States, with the chiefs, headmen, and other male adults of the Yankton tribe of Sioux or Dakota Indians upon the Yankton Reservation, in the State of South Dakota, on the thirty-first day of December, eighteen hundred and ninety-two, and now on file in the Department of the Interior, and signed by said commissioners on behalf of the United States, and by Charles Martin, Edgar Lee, Charles Jones, Isaac Hepikigan, Stephen Cloud Elk, Edward Yellow Bird, Iron Lingthing, Eli Brockway, Alex Brunot, Francis Willard, Louis Shunk, Joseph Caje, Albion Hitika, John Selwyn, Charles Ree, Joseph Cook, Brigham Young, William Highrock, Frank Felix, and Philip Ree, on behalf of the said Yankton tribe of Sioux Indians, is hereby accepted, ratified, and confirmed.

ARTICLES OF AGREEMENT

Whereas J.C. Adams and John J. Cole, duly appointed commissioners on the part of the United States, did, on the thirty-first day of December, eighteen hundred and ninety-two, conclude an agreement with the chiefs, headmen, and other male adults of the Yankton tribe of Sioux or Dacotah Indians upon the Yankton Reservation, in the State of South Dakota, which said agreement is as follows:

Whereas a clause in the act making appropriations for the current and contingent expenses of the Indian

Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth (30th), eighteen hundred and ninety-three (1893), and for other purposes, approved July 13th, 1892, authorizes the "Secretary of the Interior to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress;" and

Whereas the Yankton tribe of Dacotah – now spelled Dakota and so spelled in this agreement – or Sioux Indians is willing to dispose of a portion of the land set apart and reserved to said tribe, by the first article of the treaty of April (19th) nineteenth, eighteen hundred and fifty-eight (1858), between said tribe and the United States, and situated in the State of South Dakota:

Now, therefore, this agreement made and entered into in pursuance of the provisions of the act of Congress approved July thirteenth (13th), eighteen hundred and ninety-two (1892), at the Yankton Indian Agency, South Dakota, by J.C. Adams of Webster, S.D., John J. Cole of St. Louis, Mo., and I.W. French of the State of Neb., on the part of the United States, duly authorized and empowered thereto, and the chiefs, headmen, and other male adult members of said Yankton tribe of Indians, witnesseth:

ARTICLE I.

The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the

unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.

ARTICLE II.

In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000), as hereinbefore provided for.

ARTICLE III.

Section 1. Sixty days after the ratification of this agreement by Congress, or at the time of the first interest payment, the United States shall pay to the said Yankton tribe of Sioux Indians, in lawful money of the United States, out of the principal sum stipulated in Article II, the sum of one hundred thousand dollars ($100,000), to be divided among the members of the tribe per capita. No interest shall be paid by the United States on this one hundred thousand dollars ($100,000).

Section 2. The remainder of the purchase money or principal sum stipulated in Article II, amounting to five hundred thousand dollars ($500,000), shall constitute a fund for the benefit of the said tribe, which shall be placed in the Treasury of the United States to the credit of the said Yankton tribe of Sioux Indians, upon which the United States shall pay interest at the rate of five per centum (5) per annum from January first, eighteen hundred and ninety-three (January 1st, 1893), the interest to be paid and used as hereinafter provided for.

ARTICLE IV.

The fund of five hundred thousand dollars ($500,000) of the principal sum, placed to the credit of the Yankton tribe of Sioux Indians, as provided for in Article III, shall be payable at the pleasure of the United States after twenty-five years, in lawful money of the United States. But during the trust period of twenty-five years, if the necessities of the Indians shall require it, the United States may pay such part of the principal sum as the Secretary of the Interior may recommend, not exceeding $20,000 in any one year. At the payment of such sum it shall be deducted from the principal sum in the Treasury, and the United States shall thereafter pay interest on the remainder.

ARTICLE V.

Section 1. Out of the interest due to the Yankton tribe of Sioux Indians by the stipulations of Article III, the United States may set aside and use for the benefit of the tribe, in such manner as the Secretary of the Interior shall determine, as follows: For the care and maintenance of such orphans, and aged, infirm, or other helpless persons of the Yankton tribe of Sioux Indians, as may be unable to take care of themselves; for schools and educational purposes for the said tribe; and for courts of justice and other local institutions for the benefit of said tribe, such sum of money annually as may be necessary for these purposes, with the help of Congress herein stipulated, which sum shall not exceed six thousand dollars ($6,000) in any one year: Provided, That Congress shall appropriate, for the same purposes, and during the same time, out of any

money not belonging to the Yankton Indians, an amount equal to or greater than the sum set aside from the interest due to the Indians as above provided for.

Section 2. When the Yankton tribe of Sioux Indians shall have received from the United States a complete title to their allotted lands, and shall have assumed all the duties and responsibilities of citizenship, so that the fund provided for in section 1 of this article is no longer needed for the purposes therein named, any balance on hand shall be disposed of for the benefit of the tribe as the Secretary of the Interior shall determine.

ARTICLE VI.

After disposing of the sum provided for in Article V, the remainder of the interest due on the purchase money as stipulated in Article III shall be paid to the Yankton tribe of Sioux Indians semiannually, one-half on the thirtieth day of June and one-half on the thirty-first day of December of each year, in lawful money of the United States, and divided among them per capita. The first interest payment being made on June 30th, 1893, if this agreement shall have been ratified.

ARTICLE VII.

In addition to the stipulations in the preceding articles, upon the ratification of this agreement by Congress, the United States shall pay to the Yankton tribe of Sioux Indians as follows: To each person whose name is signed to this agreement and to each other male member of the tribe who is eighteen years old or older at the date of this

agreement, twenty dollars ($20) in one double eagle, struck in the year 1892 as a memorial of this agreement. If coins of the date named are not in the Treasury coins of another date may be substituted therefor. The payment provided for in this article shall not apply upon the principle sum stipulated in Article II, nor upon the interest thereon stipulated in Article III, but shall be in addition thereto.

ARTICLE VIII.

Such part of the surplus lands hereby ceded and sold to the United States as may now be occupied by the United States for agency, schools, and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes. But all other lands included in this sale shall, immediately after the ratification of this agreement by Congress, be offered for sale through the proper land office, to be disposed of under the existing land laws of the United States, to actual and bona fide settlers only.

ARTICLE IX.

During the trust period of twenty-five years, such part of the lands which have been allotted to members of the Yankton tribe of Indians in severalty, as the owner thereof can not cultivate or otherwise use advantageously, may be leased for one or more years at a time. But such leasing shall be subject to the approval of the Yankton Indian agent by and with the consent of the Commissioner of Indian Affairs; and provided that such leasing shall not in any case interfere with the cultivation

of the allotted lands by the owner thereof to the full extent of the ability of such owner to improve and cultivate his holdings. The intent of this provision is to compel every owner of allotted lands to cultivate the same to the full extent of his ability to do so, before he shall have the privilege of leasing any part thereof, and then he shall have the right to lease only such surplus of his holdings as he is wholly unable to cultivate or use advantageously. This provision shall apply alike to both sexes, and to all ages, parents acting for their children who are under their control, and the Yankton Indian agent acting for minor orphans who have no guardians.

ARTICLE X.

Any religious society, or other organization now occupying under proper authority for religious or educational work among the Indians any of the land under this agreement ceded to the United States, shall have the right for two years from the date of the ratification of this agreement within which to purchase the land so occupied at a valuation fixed by the Secretary of the Interior, which shall not be less than the average price paid to the Indians for these surplus lands.

ARTICLE XI.

If any member of the Yankton tribe of Sioux Indians shall within twenty-five years die without heirs, his or her property, real and personal, including allotted lands, shall be sold under the direction of the Secretary of the Interior, and the proceeds thereof shall be added to the

fund provided for in Article V for schools and other purposes.

ARTICLE XII.

No part of the principal or interest stipulated to be paid to the Yankton tribe of Sioux Indians, under the provisions of this agreement, shall be subject to the payment of debts, claims, judgments, or demands against said Indians for damages or depredations claimed to have been committed prior to the signing of this agreement.

ARTICLE XIII.

All persons who have been allotted lands on the reservation described in this agreement and who are now recognized as members of the Yankton tribe of Sioux Indians, including mixed-bloods, whether their white blood comes from the paternal or maternal side, and the children born to them, shall enjoy the undisturbed and peaceable possession of their allotted lands, and shall be entitled to all the rights and privileges of the tribe enjoyed by full-blood Indians.

ARTICLE XIV.

All allotments of lands in severalty to members of the Yankton tribe of Sioux Indians, not yet confirmed by the Government, shall be confirmed as speedily as possible, correcting any errors in same, and Congress shall never pass any act alienating any part of these allotted lands from the Indians.

ARTICLE XV.

The claim of fifty-one Yankton Sioux Indians, who were employed as scouts by General Alf. Sully in 1864, for additional compensation at the rate of two hundred and twenty-five dollars ($225) each, aggregating the sum of eleven thousand four hundred and seventy-five dollars ($11,475) is hereby recognized as just, and within ninety days (90) after the ratification of this agreement by Congress the same shall be paid in lawful money of the United States to the said scouts or to their heirs.

ARTICLE XVI.

If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians, under the treaty of April 19th, 1858, including the fee to the land as well as the right to work the quarries, the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States, to be decided by that tribunal. And the United States shall furnish, without cost to the Yankton Indians, at least one competent attorney to represent the interests of the tribe before the court.

If the Secretary of the Interior shall not, within one year after the ratification of this agreement by Congress, refer the question of the ownership of the said Pipestone Reservation to the Supreme Court, as provided for above, such failure upon his part shall be construed as, and shall be, a waiver by the United States of all rights to the ownership of the said Pipestone Reservation, and the

same shall thereafter be solely the property of the Yankton tribe of the Sioux Indians, including the fee to the land.

ARTICLE XVII.

No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

ARTICLE XVIII.

Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

ARTICLE XIX.

When this agreement shall have been ratified by Congress, an official copy of the act of ratification shall be

engrossed, in copying ink, on paper of the size this agreement is written upon, and sent to the Yankton Indian agent to be copied by letter press in the "Agreement Book" of the Yankton Indians.

ARTICLE XX.

For the purpose of this agreement, all young men of the Yankton tribe of Sioux Indians, eighteen years of age or older, shall be considered adults, and this agreement, when signed by a majority of the male adult members of the said tribe, shall be binding upon the Yankton tribe of Sioux Indians. It shall not, however, be binding upon the United States until ratified by the Congress of the United States, but shall as soon as so ratified become fully operative from its date. A refusal by Congress to ratify this agreement shall release the said Yankton Indians under it.

In witness whereof, the said J.C. Adams, John J. Cole, and J.W. French, on the part of the United States, and the chiefs, headmen, and other adult male Indians, on the part of the said Yankton tribe of Sioux or Dakota – spelled also Dacotah – Indians, have hereunto set their hands and affixed their seals.

Done at the Yankton Indian agency, Greenwood, South Dakota, this thirty-first day of December, eighteen hundred and ninety-two (Dec. 31st, 1892).

JAMES C. ADAMS, [SEAL.]
JOHN J. COLE, [SEAL.]

The foregoing articles of agreement having been read in open council, and fully explained to us, we, the undersigned, chiefs, headmen, and other adult male members

of the Yankton tribe of Sioux Indians, do hereby consent and agree to all the stipulations therein contained.

Witness our hands and seals of date as above.

Wicahaokdeun (William T. Selwyn), seal; and others:

Therefore,

Be it enacted by the Senate and House or Representatives of the United States of America in Congress assembled, That said agreement be, and the same hereby is, accepted, ratified, and confirmed.

That for the purpose of carrying the provisions of this Act into effect there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of six hundred thousand dollars, or so much thereof as may be necessary, of which amount the sum of five hundred thousand dollars shall be placed to the credit of said tribe in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum from the first day of January, eighteen hundred and ninety-three, said interest to be paid and distributed to said tribe as provided in articles five and six of said agreement. Of the amount herein appropriated one hundred thousand dollars shall be immediately available to be paid to said tribe, as provided in section one of article three of said agreement. There is also hereby appropriated the further sum of ten thousand dollars, or so much thereof as may be necessary, which sum shall be immediately available, to be paid to the adult male members of said tribe, as provided in article seven of said agreement. There is also hereby appropriated the further sum of

eleven thousand four hundred and seventy-five dollars, which sum shall be immediately available, to be paid as provided in article fifteen of said agreement: Provided, That none of the money to be paid to said Indians under the terms of said agreement, nor any of the interest thereon, shall be subject to the payment of any claims, judgments, or demands against said Indians for damages or depredations claimed to have been committed prior to the signing of said agreement.

That the lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota: Provided, That each settler on said lands shall, in addition to the fees provided by law, pay to the United States for the land so taken by him the sum of three dollars and seventy-five cents per acre, of which sum he shall pay fifty cents at the time of making his original entry and the balance before making final proof and receiving a certificate of final entry; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.

That the Secretary of Interior, upon proper plats and description being furnished, is hereby authorized to issue patents to Charles Picotte and Felix Brunot, and W.T.

Selwyn, United States interpreters, for not to exceed one acre of land each, so as to embrace their houses near the agency buildings upon said reservation, but not to embrace any buildings owned by the Government, upon the payment by each of said persons of the sum of three dollars and seventy-five cents.

That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the treaty of April nineteenth eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars.

Source: 28 Stat 286.

#20216-a-JKK
1999 SD 122

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

JAMES BRUGUIER, Petitioner and Appellant,

v.

JOSEPH CLASS, Warden,
South Dakota State Penitentiary, Appellee.

* * * *

APPEAL FROM THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT
CHARLES MIX COUNTY, SOUTH DAKOTA

* * * *

THE HONORABLE KATHLEEN K. CALDWELL
Judge

* * * *

JOHN M. WILKA of
Wilka, Haugen & Kirby, P.C. Attorney for petitioner
Sioux Falls, South Dakota and appellant.

MARK BARNETT
Attorney General

JOHN P. GUHIN
Deputy Attorney General
Pierre, South Dakota Attorneys for appellee.

* * * *

ARGUED JANUARY 13, 1999
OPINION FILED **09/01/99**

KONENKAMP, Justice.

[¶1.] In this appeal, we must again decide the status of certain lands lying within the 1858 boundaries of the Yankton Sioux Reservation. By habeas corpus petition, James Bruguier challenges state jurisdiction in Pickstown, the place of his criminal offense. The United States Supreme Court in South Dakota v. Yankton Sioux Tribe, 522 US 329, 118 SCt 789, 139 LEd2d 773 (1998) [*Yankton Sioux Tribe*], held that *unallotted* lands ceded to the United States were subject to state jurisdiction. Here we must decide the status of *allotted* lands, which have passed into non-Indian ownership. We conclude that this territory is not Indian country as defined by federal law, and therefore South Dakota properly maintains jurisdiction. We affirm the decision denying Bruguier's habeas petition.

A

[¶2.] A jury found James Bruguier guilty of first degree burglary on August 21, 1992. He later pleaded guilty to being a habitual offender. On appeal, we affirmed. State v. Bruguier, 510 NW2d 126 (SD 1993). He committed the burglary in Pickstown, South Dakota, which lies within the original 1858 boundaries of the Yankton Sioux Indian Reservation. His first petition for writ of habeas corpus was denied, but based on the U.S. District Court's decision in Yankton Sioux Tribe v. Southern Missouri Waste Management District, 890 FSupp 878 (DSD 1995), concluding that the 1858 Reservation remained intact, Bruguier filed a second petition. The circuit court also denied

that petition, based on our decision in State v. Greger, 1997 SD 14, 559 NW2d 854. While his appeal to this Court was pending, the United States Supreme Court decided *Yankton Sioux Tribe*, 522 US at 329, 118 SCt at 789. We then remanded his case for a decision on whether the burglary occurred on land retaining reservation or Indian country status under 18 USC § 1151.

[¶3.] The parties stipulated that the offense occurred on allotted land to which Indian title had been extinguished, but left to the habeas judge to decide whether the land remained Indian country under federal law. The court found that the place where the offense was committed lies on formerly allotted land, "the Indian title to which has been long extinguished [and] is now held in fee title by non-Indians."[1] Also, the court concluded the reservation had been disestablished and that no lands within the former 1858 boundaries now constitute a reservation under 18 USC § 1151; therefore, the offense did not occur in Indian country and state jurisdiction was proper. Bruguier's petition for writ of habeas corpus was denied. On the same day the circuit court signed its findings, the U.S. District Court ruled that the 1858 boundaries remain intact, thus by inference making Pickstown Indian country. Yankton Sioux Tribe v. Gaffey, 14 FSupp2d 1135 (DSD 1998) [*Gaffey*]. Bruguier now appeals.[2] Jurisdiction may

---

[1] See the shaded Pickstown map in the *Gaffey* Joint Appendix, Volume V, at 1379, Briefs from Yankton Sioux Tribe, et al. v. Gaffey, et al., (8th Cir 1999) (Nos. 98-3893, -3894, -3896, -3900).

[2] In this instance, our review of the circuit court's decision is de novo as we are deciding "whether the established facts fall within the relevant legal definition." Falls v. Nesbitt, 966 F2d 375, 377 (8th Cir 1992).

be properly challenged through a habeas petition. Flute v. Class, 1997 SD 10, ¶ 8, 559 NW2d 554, 556 (citing Weiker v. Solem, 515 NW2d 827, 830 (SD 1994)).

B

[¶4.] The legal history of the Yankton Sioux Reservation is described in *Yankton Sioux Tribe*, 522 US at 329, 118 SCt at 789, and *Greger*, 1997 SD 14, ¶ 2, 559 NW2d at 854. We address only those particulars bearing on the present question. The Yankton Sioux Indian Reservation was created by the 1858 Yankton Treaty of Cession. *Greger*, 1997 SD 14, ¶ 3, 559 NW2d at 857. With the passage of the General Allotment (Dawes) Act in 1887, the Yankton Reservation was to be partitioned with parcels to be assigned to individual tribal members.[3] In 1892, the Tribe and the United States negotiated a second treaty, which Congress ratified in 1894. *Id.* ¶¶ 1, 4. By this agreement, for a "sum certain," the Tribe "ceded, sold, relinquished and conveyed" all its unallotted reservation lands to the United States. *Id.* ¶ 1.

[¶5.] After President Cleveland's proclamation opened the unallotted lands for settlement in 1895, the area filled with settlers. The history is recounted in the writings of

---

[3] Professor Herbert Hoover points out that certain lots were earlier assigned or distributed to Yankton "families." In 1869, 177 80-acre lots were surveyed and in 1874, additional 40-acre lots were surveyed. The General Allotment Act invalidated all the "family" assignments and provided for "individual" allotments. Herbert Hoover, A Yankton Sioux Tribal Land History 5 (1995).

author and journalist, Adeline S. Gnirk.[4] In her retelling, the Chicago, Milwaukee & St. Paul Railroad secured a right-of-way in 1897 to extend its line through the opened reservation from Napa to the place where the town of Platte was later founded. The railbed was completed in 1900. Within a year four townsites originated along the railway: Wagner, Lake Andes, Geddes and Platte. Dante and Ravinia were soon added as railroad stops. The region was transformed. Typical perhaps is the rise of Lake Andes, which was platted in 1901 and formally established as a town in 1904.

> When inherited Indian lands commenced to be sold, a location was secured on Section 4, the present site. This land including the 80 acres then platted and the 120 acres adjoining had been allotted to John Arthur, or Sparrow Hawk. He died and in 1904 his only heirs, his wife Taniyawakanwin, and daughter Bessie Zitka Koyewin were induced to sell 80 acres of this land to the Lake Andes Townsite Company.

Gnirk, Papineau's Domain, *supra* note 4, at 143, *cited in Gaffey* Joint Appendix, at 765. Even during the twenty-five year trust period required by the Dawes Act, Article XI of the 1894 Act allowed for the sale of allotted lands on the death of certain allottees. By 1916, Lake Andes won a decade-long battle with the other railroad towns to become the county seat, replacing Wheeler. Construction on the new courthouse began in 1917. The town remains

---

[4] A. Gnirk, The Epic of the Realm of Ree (1984); A. Gnirk, The Epic of the Great Exodus (1985); A. Gnirk, The Epic of Papineau's Domain (1986).

the county seat to this day. Its courthouse and law enforcement center both sit on formerly allotted land.

[¶6.] For the Yanktons, too, life changed dramatically.

> Immediately after initial allotment proceedings ended in 1894, agency officials divided the reservation into two farm jurisdictions to hasten the adjustment of adults. . . . [They were taught] techniques of using horse-drawn machinery, selective livestock breeding, dry farming on arid land, and maintaining agricultural equipment.

Herbert T. Hoover & Leonard R. Bruguier, The Yankton Sioux 46 (1988). Tribal government quickly faded and became nonexistent. Indeed, the agency Superintendent in 1903 "declared that tribal government by chiefs was a thing of the past." *Id.* at 53. Even the tribal business committee disappeared, until revived years later. *Id.* The Court of Indian Offenses, which dealt with crimes by Indians against Indians on allotted land, was abolished in 1909. As the habeas court found, "[o]f the approximately 260,000 acres originally allotted to Indians, by 1913, just twenty-one years later, the tribal members held only 70,000 acres. . . . They had thus divested themselves of over 190,000 acres. By 1930, tribal members owned only 43,358 acres." The federally supported agency boarding school closed in 1919 and its students transferred to county public schools. Yanktons were added to the county jury list and several were elected or appointed to county and local offices, including clerk of courts, constable, election judge and clerk.

[¶7.] The present character of the area reflects the turn of the century changes that followed the reservation opening. From the 262,000 acres originally allotted, only

about fifteen percent remain in Indian hands. "Today, the total Indian holdings in the region consist of approximately 30,000 acres of allotted land and 6,000 acres of tribal land." *Yankton Sioux Tribe*, 522 US at 339, 118 SCt at 796 (citing Indian Reservations: A State and Federal Handbook 260 (1986)).

C

[¶8.] Bruguier committed burglary at a home in the state-chartered municipality of Pickstown. Although a substantial portion of the site on which Pickstown rests is former allotment land, none of it is now held by the Tribe or in trust. Pickstown has its own unique origin. Named for General Lewis A. Pick of the Corps of Engineers, the town was established in 1946. The U.S. Army Corps of Engineers created it as part of the Fort Randall Dam project to accommodate workers and their families. *See generally* Flood Control Act of 1944, Pub L No 78-534, 58 Stat 887 (1944) (codified as amended at 16 USC § 460d (1976)).[5] To permit building hydroelectric and flood control dams on the Missouri River, supporting enactments authorized the taking of portions of certain Indian reservations, including the nearby Crow Creek Sioux and Lower Brule Reservations.[6] In those enactments the text

---

[5] Also known as the Pick-Sloan Missouri River Basin program.

[6] *See* Act of October 3, 1962, Payment for Lands of Crow Creek Sioux Reservation, Pub L No 87-735, 76 Stat 704; Act of October 3, 1962, Payment for Lands of Lower Brule Sioux Reservation, Pub L No 87-734, 76 Stat 698; Act of September 2, 1958, Payment for Lands to Lower Brule Sioux Tribe, Pub L No

mentions taking "reservation" land. In contrast, the body of the eminent domain statute dealing with the Yankton Sioux refers to taking only "tribal and allotted lands," but the title in the original enactment (Pub L No 83-478) does refer to the Yankton Sioux Reservation.[7] *See* 43 USC § 1200e (68 Stat 453 (1954)) (authorizing expenditure to relocate tribal members "who reside or have resided, on tribal and allotted lands acquired by the United States for the Fort Randall Dam and Reservoir project"). This latter law also provided that "title to any lands acquired within Indian country pursuant to this section shall be taken in the name of the United States in trust for the Yankton Sioux Tribe or members thereof."

[¶9.] In 1957, by authority of the Federal Property and Administrative Services Act of 1949, Pub L No 63-152, 63 Stat 378, allowing disposal of surplus federal property to stimulate industrial development, Pickstown was designated by Congress as an area eligible, upon Indian request, for transfer without cost to an Indian tribe or other Indian entity. *See* 25 USC 463(d) (1997). Apparently,

---

85-923, 72 Stat 1773; Act of September 2, 1958, Payment for Lands to Crow Creek Sioux Indians, Pub L No 85-916, 72 Stat 1766; Act of September 2, 1958, Oahe Dam and Reservoir Project, Pub L No 85-915, 72 Stat 1762 (Standing Rock Sioux Tribe); Act of September 3, 1954, Pub L No 83-776, 68 Stat 1191 (Oahe Dam – Cheyenne River Tribe); Act of October 29, 1949, Pub L No 81-437, 63 Stat 1026 (Garrison Dam – Fort Berthold Tribe).

[7] The title to this Act refers to the "Yankton Sioux Indian Reservation." Yet within the body of this enactment only Lower Brule and Crow Creek are referred to as reservations. Whereas, the body of this law refers to Yankton "tribal and allotted lands."

no transfer took place. In 1985, Congress relinquished this land to the municipal corporation serving the people of Pickstown.

> TRANSFER OF FEDERAL TOWNSITES
>
> (a)(1) Except as otherwise provided in this Act and notwithstanding any other provision of law, the Secretary of the Army shall transfer, without consideration and without warranty of any kind, all rights, title, and interests of the United States in each of the following described lands (including all improvements on such lands) to the municipal corporation serving the inhabitants of such land as soon as possible after the incorporation of such municipal corporation:
>
> * * *
>
> (B) The land referred to as Pickstown, South Dakota, consisting of 393 acres, more or less. . . .

Supplemental Appropriations Act of 1985, Pub L No 99-88, ch VI, 99 Stat 293, 317. This law was later amended "by striking out 'without warranty of any kind' and inserting in lieu thereof 'by warranty deed, said deed to include a covenant to defend title to the property.' " Water Resources Development Act of 1986, Pub L No 99-662, 100 Stat 4082, 4242.[8]

---

[8] The amendment also conveyed an additional twenty-three acres of land used by Pickstown as a sanitary landfill. The Corps of Engineers retained a 9-acre tract where maintenance buildings and an office building are located. The office building houses the town's Post Office and Credit Union under lease. Also retained was a cold storage warehouse and immediate land located on a 16-acre tract.

[¶10.] We appreciate, of course, that a federally authorized townsite may still be Indian country if it exists within the boundaries of an Indian reservation, even after title has been transferred in fee to non-Indians. Seymour v. Superintendent of Washington State Penitentiary, 368 US 351, 358-59, 82 SCt 424, 428-29, 7 LEd2d 346 (1962). In addition, reservation land taken by eminent domain will not necessarily extinguish reservation boundaries. Lower Brule Sioux Tribe v. State of South Dakota, 711 F2d 809 (8th Cir 1983). Yet, when read together, these enactments appear incompatible with any conception of this region as part of an existing Indian reservation. No reference is made to taking "reservation" land from the Yankton Sioux in the various flood control takings statutes. And Congress must not have considered Pickstown Indian country taken in trust for the Yankton Tribe or its members, for it was not returned to them, but to the municipal corporation.

[¶11.] Nonetheless, the Federal Government has been inconsistent in its references to the Yankton Reservation over the past century. We think it prudent, therefore, to analyze the question further under traditional Indian law standards established by the Supreme Court. *See Yankton Sioux Tribe*, 522 US at 354, 118 SCt at 803 ("Congress and the Executive Branch have described the reservation in contradictory terms and treated the region in an inconsistent manner.").

D

[¶12.] "Interpretation of federal law is the proprietary concern of state, as well as federal, courts." Idaho v.

Coeur d'Alene Tribe of Idaho, 521 US 261, 275, 117 SCt 2028, 2037, 138 LEd2d 438 (1997). Indeed, the jurisdictional issue here is as vital to South Dakota as it is to the Yankton Sioux Tribe and the Federal Government; thus, it is proper for this Court to determine where state jurisdiction lies.[9] Whether land falls within a reservation or constitutes Indian country "depends upon the interpretation and application of federal law." *Seymour*, 368 US at 353, 82 SCt at 426.

> [O]nly Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.

Solem v. Bartlett, 465 US 463, 470, 104 SCt 1161, 1166, 79 LEd2d 443 (1984) (citing United States v. Celestine, 215 US 278, 285, 30 SCt 93, 94-95, 54 LEd 195 (1909)); *see also Yankton Sioux Tribe*, 522 US at 343, 118 SCt at 798 ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation."); DeCoteau v. District County Court for the Tenth Judicial Dist., 420 US 425, 444, 95 SCt 1082, 1092-93, 43 LEd2d 300 (1975) (after a reservation has been created "all tracts included within it remain a part of the reservation until separated therefrom by Congress");

---

[9] For this reason, we have received and reviewed all the briefs and exhibits submitted to the Eighth Circuit Court of Appeals in Yankton Sioux Tribe v. Gaffey, Nos. 98-3893, -3894, -3896, -3900. The status of approximately 222,000 acres of formerly "allotted" land now owned by non-Indians in southern Charles Mix County is open to uncertainty.

Monroe Price & Robert Clinton, Law and the American Indian 96 (2d ed 1973) ("Once a reservation has been established, or a dependent Indian community shown to exist, it will remain Indian country until terminated by Congress, irrespective of the nature of the land ownership.").

[¶13.] Congressional intent to terminate a reservation is not "lightly found" and ambiguities are to be resolved against it. Hagen v. Utah, 510 US 399, 411, 114 SCt 958, 965, 127 LEd2d 252 (1994) (citations omitted); *see also DeCoteau*, 420 US at 444, 95 SCt at 1092-93. Intent to remove land from reservation status must be clearly manifested. *DeCoteau*, 420 US at 444, 95 SCt at 1093. Without unambiguous intent, the general rule that "doubtful expressions" are construed in a light most favorable to the Indians, applies to our review of statutory and treaty language. *Id.*

E

[¶14.] The Federal Government generally has jurisdiction over Indian country, along with the Indian Tribe inhabiting it. Alaska v. Native Village of Venetie Tribal Gov't, 522 US 520, 527 n 1, 118 SCt 948, 952 n 1, 140 LEd2d 30 (1998) [*Venetie*]. Bruguier contends that whatever their present ownership, all originally allotted lands maintain Indian country status under 18 USC § 1151(a), as they lie within the 1858 boundaries of the Yankton Sioux Indian Reservation.[10] He believes that nothing in the negotiations, the treaty, or the later development in

---

[10] This was essentially the U.S. District Court's decision in *Gaffey*, 14 FSupp2d at 1135.

the territory suggests that sales of *allotted* land to non-Indians would diminish the reservation beyond what the sale of the *unallotted* land accomplished. On the other hand, the State argues, based on *Greger*, that the reservation was disestablished by the 1894 Act, leaving as Indian country only Indian retained allotments and tribally owned land.[11]

[¶15.] Our task is to decide whether Pickstown is Indian country. More precisely, the question is whether parcels originally allotted to individual Yanktons compose part of a permanent reservation under 18 USC § 1151(a), or whether only those allotments still held in Indian hands are Indian country under 18 USC § 1151(c).[12] Three categories of land qualify as Indian country under 18 USC § 1151. First, § 1151(a) includes as Indian country those

---

[11] As we were only dealing with the question whether the sale of all unallotted lands shrunk the boundaries of the reservation, *Greger* found the reservation had been *diminished*, rather than *disestablished*.

[12] 18 USC § 1151 provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

lands within the boundaries of a reservation under United States Government jurisdiction. Second, § 1151(b) defines Indian country as "all dependent Indian communities" within the United States. We need not address this subsection as no one in this appeal contends the Pickstown site or any other place on similarly non-retained allotment land is a "dependent Indian community." Third, § 1151(c) includes as Indian country all Indian allotments that have not lost their Indian titles.[13]

[¶16.] In State ex rel. Hollow Horn Bear, 77 SD 527, 95 NW2d 181 (1959), we interpreted 18 USC § 1151 to mean that subsection (a) encompasses those areas within a reservation, and that subsection (c) applies to those lands standing outside reservation boundaries.

---

[13] 18 USC § 1151 was enacted in 1948. The Reviser's Note to the statute indicates that the definition of Indian country was derived from "the latest construction of the term by the United States Supreme Court." 18 USC § 1151 reviser's note. Congress used language from United States v. McGowan, 302 US 535, 58 SCt 286, 82 LEd 410 (1938), United States v. Pelican, 232 US 442, 34 SCt 396, 58 LEd 676 (1914), United States v. Sandoval, 231 US 28, 34 SCt 1, 58 LEd 107 (1913), and Donnelly v. United States, 228 US 243, 33 SCt 449, 57 LEd 820 (1913). In *Pelican*, the Court decided whether an Indian allotment that was once part of the Colville Indian Reservation but was situated in a part of the reservation that had been opened to settlement by Congress was Indian country. 232 US at 444-45, 34 SCt at 397. The Colville Indian Reservation was included in the definition of Indian country, as it had "been segregated from the public domain." *Id.* at 445, 34 SCt at 397. The Court concluded that because the land was an allotment held in trust for an individual Indian, the federal government still retained criminal jurisdiction over this land, even though the land lay in the diminished part of the reservation. *Id.* at 447, 33 SCt at 398.

> If subsection (a) is to receive a literal interpretation a patent to allotted lands within the limits of such a reservation which operated to extinguish the Indian title would not remove such a tract from Indian country, but under subsection (c) such a patent would so operate. Hence, it seems logical to believe that the Congress intended subsection (a) to apply to the closed area of reservations, and (c) to apply to allotted lands in open territory.

Hollow Horn Bear, 77 SD at 533, 95 NW2d at 185. If the only Indian country remaining is land the Yankton Tribe acquired long after the 1894 Act, along with remaining Indian owned allotments under § 1151(c), then the Yankton Sioux Reservation may be considered congressionally terminated.

F

[¶17.] In *Yankton Sioux Tribe*, the Supreme Court ruled that "Congress diminished the Yankton Sioux Reservation in the 1894 Act, that the unallotted tracts no longer constitute Indian country, and thus . . . the State has primary jurisdiction over . . . lands ceded under the Act." 522 US at 358, 118 SCt at 805. The Court limited its holding to deciding only that the "unallotted, ceded lands were *severed* from the reservation[.]" *Id.* (emphasis added). Left undecided was whether there now exists any reservation boundary, and if so, where it lies. We conclude, the boundaries created in the 1858 Treaty no longer exist because no provision was made in the 1894 Act to delineate any boundary, as in the 1858 Treaty. In most

instances, when a reservation is diminished, its boundaries "shrink." *Solem*, 465 US at 471, 104 SCt at 1166. Indeed, the Supreme Court in *Yankton Sioux Tribe* found that the 1894 Act is "readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries." 522 US at 345, 118 SCt at 799.

[¶18.] Even with the 1858 boundaries extinct, however, we still must return to the Supreme Court's traditional three-factor "analytical structure" to decide the status of the lands left unresolved in *Yankton Sioux Tribe*. *Hagen*, 510 US at 411, 114 SCt at 965.

> The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands. We have also considered the historical context surrounding the passage of the surplus land Acts, although we have been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage. Finally, "[o]n a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation."

Id. (internal citations omitted) (quoting *Solem*, 465 US at 471, 104 SCt at 1166-67). *Yankton Sioux Tribe* and *Greger* scrutinized these three factors. We need not repeat all their conclusions here. Instead, we will touch on those points deemed more ambiguous.

1. Statutory Language

[¶19.] Articles I and II of the 1894 Act provided that the Yankton Tribe did "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation" and that in consideration for the "lands ceded, sold, relinquished, and conveyed" the United States agreed to pay a sum certain of $600,000. *Yankton Sioux Tribe*, 522 US at 344, 118 SCt at 798; *Greger*, 1997 SD 14, ¶ 4, 559 NW2d at 858. Equivalent language signaled termination of the reservation in *DeCoteau*, where the Supreme Court noted that such terminology was "precisely suited" to such purpose. 420 US at 445, 95 SCt at 1093. Being the most probative evidence, this cession language manifests an almost irrebuttable presumption of congressional intent. *Greger*, 1997 SD 14, ¶ 1, 559 NW2d at 855-56. Yet, other clauses in the Act are less absolute. Are these so uncertain as to negate the nearly conclusive import of the cession language? To appreciate the idiom of the 1894 Act, it is first important to understand the genesis of the allotment system and the legal notion of Indian ownership of reservations at that time.

[¶20.] Many well-meaning reformers, legislators, and federal officials viewed reservations as interim solutions to eventual Native American assimilation. When compressed, they theorized, Indian "detribalization" and "Americanization" would take place.[14] Reservations,

---

[14] As one historian expressed:

> For more than one-half century, sincere friends of the Indians had been advocating the individual ownership of land as the salvation of any Indian who

therefore, were expected to have a limited life span. Arrell Morgan Gibson, The American Indian, Prehistory to the Present, 452, 486, 489, 491 (DCHeath & Co 1980). The Dawes Act had the dual goal of hastening the "detribalizing" process and opening reservation land to "homeseekers." *Id.* at 494-95, 498, 506. *See also Solem*, 465 US at 468, 104 SCt at 1165 (surplus land acts anticipated imminent demise of reservations and were enacted partly to facilitate the process). It would end common ownership by tribes, as well as the tribal way of life.

> Under the practice of allotting lands in severalty to individual Indians, title to the allotted land was held in trust by the Government for the benefit of the allottee, or vested in the allottee subject to a restraint against alienation. Obviously, in either case tribal title is not involved.

Felix Cohen, Handbook of Federal Indian Law 7-8 (1st ed reprint 1986). The allotment system later proved a dreadful failure, but at the time it was assumed that, for the benefit of assimilation and civilization, Indian and non-

---

> would accept it. Like other mistaken policies it was all part of the centuries-old aim of changing Indians into white people. Break up their natural grouping, whether by abolishing the government of advanced tribes or undermining the influence of primitive chiefs, and set each family alone on a farm to develop habits of industry and the pride of possession. . . . The Indians' friends also argued that only a fee simple title would protect their land from the insecurity of reservation and treaty guarantees.

Angie Debo, A History of the Indians of the United States 299 (UOkPress 1970).

Indian families would intersperse over the opened reservations, making tribal existence and governance obsolete. *Solem*, 465 US at 468, 104 SCt at 1165. These philosophic assumptions emerge in the negotiations between Government representatives and Yankton Tribe members, where both sides spoke of tribal life as soon to be outdated. *Yankton Sioux Tribe*, 522 US at 353, 118 SCt at 803 (citing Report of the Yankton Indian Commission (Mar 31, 1893), at 19, *reprinted in* S Exec Doc No 27, 53d Cong, 2d Sess, 9-11 (1894); S Misc Doc No 134, 53d Cong, 2d Sess, 1 (1894)).

[¶21.] The Government's notion of Indian ownership and how it legally ended can be seen in congressional enactments and early Supreme Court decisions. In 1834, Congress statutorily defined Indian country. It upheld the communal objective of tribal communities with the understanding that once title to Indian land was extinguished, the land was no longer in Indian ownership.

> That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be Indian country.

Act of June 30, 1834, Pub L No 23-161, 4 Stat 729. When the U.S. Code was revised, however, this section was not included, effectively repealing it. Cohen, *supra*, at 6. The definition, nevertheless, shows that even in early usage of the term Indian country, Congress intended it to include

only those lands to which Indian title had not been extinguished.

[¶22.] After repeal of 1834 definition of Indian country, the Supreme Court in Bates v. Clark, 95 US 204 (1887), defined the term:

> The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.

Id. at 208; *see* Cohen, *supra*, at 7 (explaining the origin of the definition of Indian country). *See generally* Perrin v. United States, 232 US 478, 34 SCt 387, 58 LEd 691 (1914). In *Greger*, we observed that "*Perrin*'s notion of Indian country was consistent with the view at the time that reservations included 'only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians.' " 1997 SD 14, ¶ 8, 559 NW2d at 860 (quoting *Solem*, 465 US at 468, 104 SCt at 1165). In sum, Indian title in common, or put another way, tribal title, ended when tribal ownership ended. *Yankton Sioux Tribe*, 522 US at 346, 118 SCt at 798, (citing *Solem*, 465 US at 468, 104 SCt at 1164) (tribal ownership coextensive Indian ownership).

[¶23.] Noteworthy in the 1894 Act is the absence of any provision for tribal ownership. No land was reserved

even for tribal purposes.[15] By eliminating tribal ownership, the "common understanding of the time" was that a "critical component of reservation status" was lost. *Yankton Sioux Tribe*, 522 US at 346, 118 SCt at 799. Individual Indians received their allotments and, except for agency and school land, all the rest was sold and opened for homesteads and townsites. It was not until the following century that Indian ownership and tribal ownership were legally distinguished in identifying Indian country. By then, of course, more tolerant and enlightened notions of preserving aboriginal self-determination and culture gained ascendancy. Congressional enactments suitably followed. Congress has "plenary power over Indian affairs, including the power to modify or eliminate tribal rights." *Id.* at 343, 118 SCt at 798 (citations omitted); *see also Sandoval*, 231 US at 46, 34 SCt at 5-6 ("Congress . . . has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease."). With this background in mind, we examine a few of the purportedly discrepant provisions in the 1894 Act.

[¶24.] The Supreme Court in *Yankton Sioux Tribe* expressed some misgivings on the import of certain language in Article VIII.

---

[15] It was decades after the reservation was opened that the Tribe acquired land from the Government that the United States no longer needed. Act of February 13, 1929, Pub L No 70-729, 45 Stat 1167 (returning to Tribe 1000 acres titled in United States that had been reserved in the 1894 Act for "agency, school, and other purposes").

> Although we agree with the State that the school sections clause reinforces the view that Congress intended to extinguish the reservation status of the unallotted land, a somewhat contradictory provision counsels against finding the reservation terminated. Article [VIII] of the 1894 Act reserved from sale those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes." In *Solem*, the Court noted with respect to virtually identical language that "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation." 465 U.S. at 474, 104 S.Ct. 1168.

Yankton Sioux Tribe, 522 US at 350, 118 SCt at 801. Reserving to the United States lands for agency, school and other purposes suggests continued Government support for tribal members, and possibly evinces the notion of a continuing reservation. Yet, the uncertainty of this provision cannot carry the significance it did in *Solem*. There, the critical cession language was not suited to finding intent to terminate the reservation.

[¶25.] In keeping with the Dawes Act's twenty-five year trust period following the allotting process, setting aside government land for school and agency purposes was common, even for a terminated reservation.[16] In the 1891 treaty with the Sisseton-Whapeton [sic] Tribes, it was understood that on the Lake Traverse Reservation, the United States would continue to own land for school and

---

[16] After the opening, federal officials provided assistance to help the Yanktons' transition into agriculturists. *See* Hoover & Bruguier, *supra*, at 46.

agency purposes. *See DeCoteau*, 420 US at 435 n 16, 95 SCt at 1088 n 16 ("Government should own the lands upon which the agency and school building are located."); *id.* at 438 n 19, 95 SCt at 1089 n 19 (" 'Indian title' " to lands occupied by the " 'agency and missionary society' " will be " 'extinguished' " (citation omitted)). Moreover, reserving such "lands for Indian schools, religious missions, and service agencies" did not preclude finding congressional intent to disestablish a part of the Rosebud Reservation. *See* Rosebud Sioux Tribe v. Kneip, 430 US 584, 622, 97 SCt 1361, 1381, 51 LEd2d 660 (1977) (Marshall, J., dissenting).

[¶26.] Another provision that bears further scrutiny is Article XIV of the 1894 Act:

> All allotments of land in severalty to members of the Yankton tribe of Sioux Indians, not yet confirmed by the Government, shall be confirmed as speedily as possible, correcting any errors in same, and *Congress shall never pass any act alienating any part of these allotted lands from the Indians.*

(emphasis added). This, too, is consistent with the initial twenty-five year trust relationship. At the time of negotiations, much of the land to be allotted had yet to be processed. Though opposed to partitioning their land when the Dawes Act first passed, Yankton tribal members expressed concern during the 1892 negotiations with the slowness of the approval process. A history of broken promises and failures to deliver timely, adequate provisions as part of the 1858 Treaty created understandable Yankton skepticism about whether all the allotments would be distributed. Taken in context, this provision

simply assured that those entitled to allotted parcels would receive them as soon as possible, and once received, they would not be taken away. Nothing in this provision can be interpreted as precluding individual Indian owners from later transferring their property to non-Indians after the trust period expired.

[¶27.] Even if the more uncertain provisions of the 1894 Act cannot be wholly explained, congressional intent to end the Yankton Reservation is sufficiently clear in its "precisely suited" cession language. As the Supreme Court noted with respect to the Article XVIII saving clause, " 'it is a commonplace of statutory construction that the specific' cession and sum certain language in Articles I and II 'governs the general' terms. . . . " *Yankton Sioux Tribe*, 522 US at 348, 118 SCt at 800 (citation omitted).

2. Historical Context

[¶28.] Although there are inconsistencies in this sphere also, we find little in the historical context or the Treaty negotiations to suggest that the reservation would continue. "[T]he record of the negotiations between the Commissioners and the Yankton Tribe contains no discussion of the preservation of the 1858 boundaries. . . . " *Id.* at 347, 118 SCt at 800.

> [T]he Commissioners' report of the negotiations signaled their understanding that the cession of the surplus lands dissolved tribal governance of the 1858 reservation. They observed that "now that [members of the Tribe] have been allotted their lands in severalty and have sold their surplus land – the last property bond which

> assisted to hold them together in their tribal interest and estate – their tribal interests may be considered a thing of the past." And, in a March, 1894, letter to the Chairman of the Senate Committee on Indian Affairs, several Yankton chiefs and members of the Tribe indicated that they concurred in such an interpretation of the agreement's impact. The letter urged congressional ratification of the agreement, explaining that the signatories "want[ed] the laws of the United States and the State that we live in to be recognized and observed," and that they did not view it as desirable to "keep up the tribal relation . . . as the tribal relation on this reservation is an obstacle and hindrance to the advancement of civilization."

Id. at 353, 118 SCt at 802-03 (internal and other citation omitted). Implicit in the negotiations was an opened area without boundaries; explicit was an end to tribal existence upon the distribution of allotments and the sale of unallotted lands. Without tribal existence, without communal land, the historical context points to an understanding that the reservation would no longer continue to exist. As the Supreme Court wrote in *Yankton Sioux Tribe*, "[i]n this case, although the context of the Act is not so compelling that, standing alone, it would indicate diminishment, neither does it rebut the 'almost insurmountable presumption' that arises from the statute's plain terms." 522 US at 351, 118 SCt at 802 (citation omitted).

3. Resultant Developments in the Area

[¶29.] We recognize that a "surge in non-Indian settlement" is the "least compelling" proof in our examination

of this question. *Id.* at 356, 118 SCt at 804. It was congressional intent in passing the 1894 Act that primarily controls the analysis and not the later movements of settlers and others. Yet we cannot ignore the palpable reality that, as the years passed after the 1895 opening, no one *behaved* as if the reservation remained in existence, not the Federal Government, not the Yankton Sioux, not the State, not the homesteaders, not the townspeople. However carefully we may pore over the thousands of words in treaty negotiations, in chronicles, in agency reports, in statutes, in latter day scholarly exegesis, we cannot ignore the historical actuality of what happened following the opening. The area was utterly transformed.

[¶30.] Following a recurrent theme, first came the settlers, then the railroads, then the towns, and businesses. This precipitous change in regional character is undeniable. If not dispositive of the question, it certainly has a persuasive bearing on our decision. Later actions may elucidate what Congress expected and here "the area remains 'predominantly populated by non-Indians with only a few surviving pockets of Indian allotments,' and those demographics signify a diminished reservation." *Id.* at 356-57, 118 SCt at 804 (quoting *Solem*, 465 US at 471 n 12, 104 SCt at 1167 n 12).

[¶31.] With the opening of the reservation came law and order administered by the State, with few exceptions.[17] No distinction was made between ceded lands and allotted lands that passed out of Indian hands. The "single

---

[17] Those exceptions have to do with tribal police and federal officials dealing with matters on trust lands, which, as we know, quickly dwindled.

most salient fact [relating to later jurisdictional history] is the unquestioned actual assumption of state jurisdiction. . . . " *Rosebud Sioux Tribe,* 430 US at 603, 97 SCt at 1371. In *Yankton Sioux Tribe,* the Supreme Court considered this factor influential: "The State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing unchallenged to the present day, further reinforces our holding." 522 US at 357, 118 SCt at 804. The only areas still treated as Indian country were the allotted lands, which remained under Indian ownership. Later, when the Tribe acquired certain lands, they were also considered out of the State's jurisdiction.

[¶32.] In the century following the opening of the reservation, the Yanktons themselves referred to their common land or "reservation" as a "mile square." *Greger,* 1997 SD 14, ¶ 5, 559 NW2d at 859. At the time of the 1894 Act, this "reservation" was federal agency land, as reserved in Article VIII, not tribal or common land. Even more significantly, both the 1932 Yankton Tribal Constitution and the amended Constitution of 1962 defined the Tribe's property as including only those tribal lands currently owned by the Tribe. Not until 1990 was the Yankton Constitution amended to encompass all lands and waters within the 1858 Treaty boundaries. This belated reclamation cannot overcome a century of development and reliance at odds with it, much less the congressional intent in the 1894 Act.

[¶33.] We see little evidence to depart from our previous conclusion on this point in *Greger.*

> Today, less than ten percent of the land within the 1858 Treaty boundaries is trust land. Over 600 miles of road in the area are maintained by

> county and township authorities. Only 22 miles are maintained by the Bureau of Indian Affairs. The state-chartered municipalities of Wagner, Lake Andes, Dante, Pickstown, Ravinia, and Marty all lie within the former boundaries. Non-Indians comprise over two-thirds of the population in the area.
>
> * * *
>
> [I]f we accept defendant's arguments, over 6000 citizens of Charles Mix County would presently find they have become residents of an Indian reservation. This region has not been considered a reservation by the general populace.

Greger, 1997 SD 14, ¶¶ 29, 30, 559 NW2d at 867. Dante, Lake Andes and Ravinia are on former allotments. Pickstown and Wagner are partly situated on former allotments. The Charles Mix County seat (the courthouse and law enforcement center) are located on former allotment land.

[¶34.] Our Court has repeatedly held that South Dakota has jurisdiction over both ceded unallotted land and allotted parcels no longer titled in Indian ownership. In Wood v. Jameson, 81 SD 12, 18, 130 NW2d 95, 99 (1964), we discerned a congressional purpose "to disestablish the reservation and restore to the public domain the lands therein with the exception of allotments in severalty." Thus we concluded that an offense at Lake Andes was not committed within Indian country. In State v. Williamson, 211 NW2d 182, 184 (SD 1973), we held that "the Act of 1894 disestablished that portion of the Yankton Reservation which was ceded and sold to the United States," including the cities of Lake Andes and Wagner.

Cf. State v. Winckler, 260 NW2d 356, 360 (SD 1977) (Yankton Sioux Tribe Pork Plant at Wagner is trust land, thus, Indian country).

[¶35.] A conclusion that, despite present ownership, all originally allotted land is part of a reservation creates new federal, tribal and state jurisdictional lines within Charles Mix County and its communities that not only affect law enforcement matters, but innumerable other issues both momentous and mundane: taxation, licensing, voting, economic development, environmental protection. To turn back now, to hold that the reservation was not terminated when for so many years that has been legal conception of both Indians and non-Indians, would create a jurisdictional maze, and defeat "the justifiable expectations of the people living in the area." *Hagen*, 510 US at 421, 114 SCt at 970.

G

[¶36.] Paralleling the Act of 1894 under consideration here is the 1891 Act terminating the Lake Traverse Indian Reservation as decided in *DeCoteau. Yankton Sioux Tribe*, 522 US at 344-45, 118 SCt at 798. It is difficult to find any jural distinction between the two reservation sales. Even in 1892, the negotiators for the Yankton agreement repeatedly referred back to the Sisseton-Whapeton [sic] agreement, expressing their intent to effect the same result. In the end, pursuant to the General Allotment Act, both reservations were, in the same time frame, parceled to individual Indians, and all unallotted lands were sold to

the United States. Both Acts used the same cession language: "cede, sell, relinquish and convey. . . . " The intent behind this language is unmistakably the same.

[¶37.] Like the 1891 Act, "[t]he 1894 Act contains the most certain statutory language, evincing Congress' intent to diminish the Yankton Sioux Reservation by providing for total cession and fixed compensation." *Yankton Sioux Tribe*, 522 US at 357, 118 SCt at 805; *see DeCoteau*, 420 US at 445-46, 95 SCt at 1093-94. In each instance, *all* unallotted lands were sold. With both treaties, the heart of the preamble language recited intent "to dispose of a portion of the land set aside and reserved" to them. On both reservations, the opened lands were subject to the homestead and townsite laws of the United States. In both cases, the United States retained an agency and schools. Most significantly, no land in common was retained, no boundaries were redefined, and the parcels allotted to Indians were in both instances spread randomly across the former reservations. *Yankton Sioux Tribe*, 522 US at 334-40, 118 SCt at 793-96; *DeCoteau*, 420 US at 428, 95 SCt at 1085. In both Acts, it was provided that "excepting the sixteenth and thirty-sixth sections . . . shall be reserved for common school purposes, and be subject to the laws of" the State. The proclamations opening the reservations each referred to a "schedule of lands within the . . . reservation. . . . " Upon opening the land for settlement, in both instances South Dakota assumed unchallenged jurisdiction in all areas except on trust lands. *Yankton Sioux Tribe*, 522 US at 357, 118 SCt at 804; *DeCoteau*, 420 US at 442, 95 SCt at 1092. The *DeCoteau* Court perceived these circumstances to signal congressional intent to terminate the reservation and restore the

land to the public domain. We believe the same intent is shown in the Yankton Reservation sale.

CONCLUSION

[¶38.] The place in Pickstown where Bruguier committed his crime lies on land within the original 1858 boundaries of the Yankton Sioux Reservation. This area was initially allotted to a member of the Yankton Sioux Indian Tribe, but was later sold in fee to a non-Indian. Pickstown was created in 1946 as a federal reserve for the U.S. Army Corps of Engineers. Congress later relinquished ownership of this townsite to Pickstown's municipal corporation. It appears that Congress did not consider this area Indian country or an existing Indian reservation. Nonetheless, to comply with Supreme Court jurisprudence in deciding if this area is Indian country, we further considered the matter under the traditional principles the Court instituted.

[¶39.] Our analysis requires us to interpret a Nineteenth Century treaty, negotiated, enacted and enforced under outmoded values and discarded beliefs. In *Greger*, we refrained from interpreting the 1894 Act any broader than necessary. The Supreme Court in *Yankton Sioux Tribe* likewise decided only that the ceded portion of the reservation was diminished. Today we proceed further to decide the jurisdictional status of former allotments.

[¶40.] We conclude that Pickstown is not Indian country under 18 USC § 1151. It is not situated within the boundaries of a reservation because the Yankton Sioux Reservation was effectively terminated by the 1894 Act. Nor is it trust land, a dependent Indian community, or property

held by the Tribe. Consequently, the State properly exercised jurisdiction over Bruguier and the circuit court correctly denied his habeas corpus petition.

[¶41.] Affirmed.

[¶42.] MILLER, Chief Justice, and SABERS, AMUNDSON, and GILBERTSON, Justices, concur.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3893/3984/3896/3900SDSF

Yankton Sioux Tribe, et al.,	*	Appeal from the
	*	United States
Appellee,	*	District Court for
	*	the District of
vs.	*	South Dakota
	*	
Matt Gaffey, et al.,	*	
	*	
Appellants,	*	

The motion to enlarge the record is denied without prejudice to the rights of the parties to seek to introduce the materials in the district court on remand.

(5120-010199)

December 9, 1999

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
MAY 5 - 2000
CLERK

No. 99-1490

In The

Supreme Court of the United States

STATE OF SOUTH DAKOTA; WILLIAM JANKLOW, Governor of South Dakota; MARK W. BARNETT, Attorney General of South Dakota; SCOTT PODHRADSKI, State's Attorney of Charles Mix County; HERMAN PETERS, Member of the Charles Mix, South Dakota, County Commission; BRUCE BAKKEN, Member of the Charles Mix, South Dakota, County Commission; JACK SOULEK, Member of the Charles Mix, South Dakota, County Commission; SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Petitioners,

v.

YANKTON SIOUX TRIBE, and its individual members; UNITED STATES OF AMERICA, on its own behalf and for the benefit of the Yankton Sioux Tribe; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

MARY T. WYNNE
Counsel of Record
212 N. 2nd Avenue, Suite 205
Okanogan, WA 98840
(509) 422-6267
Counsel for Respondent Yankton Sioux Tribe

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23 pp

TABLE OF CONTENTS

Page

REASONS FOR DENYING STATE PETITION FOR A WRIT OF CERTIORARI 1

I. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH A DECISION OF THE SOUTH DAKOTA SUPREME COURT 2

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH *DECOTEAU V. DISTRICT COUNTY* COURT 9

A. The Court of Appeals applied the correct legal test to determine whether the Yankton Sioux Reservation has been disestablished 9

B. The instant case is not one of the rare cases which this Court should review based upon an alleged misapplication of a correct legal test or alleged erroneous findings of fact 11

III. THE COURT OF APPEALS' HOLDING THAT THE RESERVATION INCLUDES LAND RESERVED FROM SALE BY THE U.S. IN 1894 IS CONSISTENT WITH *YANKTON I* 13

IV. THE ISSUES RAISED IN THE STATE PETITION FOR A WRIT OF CERTIORARI LACK BROAD IMPORTANCE 15

A. The issue raised by the State does not affect jurisdiction over land 15

B. The amount of land at issue in the State's petition is small 19

TABLE OF CONTENTS – Continued

Page

C. The State's other allegations of potential effects do not provide cause to grant a writ of certiorari 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

DeCoteau v. District County Court, 420 U.S. 425 (1975) 9, 10, 11, 20, 22

Hagen v. Utah, 510 U.S. 399 (1994) 10

Mattz v. Arnett, 412 U.S. 481 (1973) 10

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 10, 21, 22

Seymour v. Superintendent, 368 U.S. 351 (1962) 10

Solem v. Bartlett, 465 U.S. 463 (1984) 10

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) 7, 10, 13, 14, 15

CIRCUIT COURT CASES

Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999) ..... *passim*

DISTRICT COURT CASES

Yankton Sioux Tribe v. Gaffey, 14 F. Supp. 2d 1135 (D.S.D.1998) 12, 13, 19

STATE COURT CASES

Bruguier v. Class, 599 N.W.2d 364 (S.D. 1999) .... *passim*

Cain v. Ehrler, 153 N.W. 941 (S.D. 1915) 3

State v. Thompson, 355 N.W.2d 349 (S.D. 1984) 6, 7

State v. Williamson, 211 N.W.2d 182 (1973) 7

State v. Winckler, 260 N.W.2d 356 (S.D. 1977) 6, 7

TABLE OF AUTHORITIES – Continued

Page

STATUTES

26 Stat. 1036 12

28 Stat. 286, 314 (1894 Act) ..... *passim*

18 U.S.C. § 1151 ..... *passim*

REASONS FOR DENYING STATE PETITION FOR A WRIT OF CERTIORARI

In its petition, the State of South Dakota asks this Court to grant a writ of certiorari to resolve alleged conflict between the Court of Appeals' ruling and rulings of this Court and rulings of the South Dakota State Supreme Court. Specifically the State argues that this Court should determine whether the Yankton Sioux Reservation was disestablished in 1894.

Before reaching the substance of this response, the Tribe must discuss the meaning of the State's "Question Presented." While the State claims to present only one question, its seventy-two word "Question Presented" and the body of its petition presents many legal issues, including:

1. Was the Reservation disestablished?

2. Does the Reservation include the Federal Reserve?

3. Does the Reservation include allotments which are still held by Indians?

4. Did the District Court make erroneous factual findings regarding the negotiation history and intent of the 1892 agreement?

5. Did the Court of Appeals misapply a properly stated rule of law when it determined that the Reservation was diminished but not disestablished?

The Court should separately analyze each issue which the State presents, to determine if any merit review by this Court. The Tribe's position is that this Court should determine that none of the above questions meet

the criteria for Supreme Court review under this Court's Rule 10. There are two separate factors which the Court considers in determining whether to grant a writ of certiorari. The first is whether there is an actual conflict of law between Court rulings on the issue presented. The second is whether such conflict raises an issue which is of sufficient importance to become one of the few cases the Court hears each term. The State's petition does not present an actual conflict, and it does not present an issue of legal importance.

I. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH A DECISION OF THE SOUTH DAKOTA SUPREME COURT

In its petition for a writ of certiorari, the State of South Dakota argues that the decision of the Court of Appeals conflicts with the decision of the South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999). The *Bruguier* opinion was issued by the South Dakota Supreme Court one day after the Court of Appeals entered its opinion in *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (1999) (hereinafter *Yankton II*). The basis of the State's argument is the State's claim that *Bruguier* "unanimously held that the 1894 Act disestablished the Yankton Sioux Reservation." As is plainly evident from the opinion, *Bruguier* did not so hold.

The actual holding of *Bruguier* is identical to the Court of Appeals' holding in *Yankton II*. *Bruguier's* limited holding is that the State has criminal jurisdiction over a member of the Yankton Sioux Tribe when the crime is committed on a former Indian trust allotment

that has passed to non-Indian ownership in fee simple. Identically, the Court of Appeals, in *Yankton II,* held that the State has criminal jurisdiction over tribal members on such former allotments. Although the *Yankton II* opinion has a broader reach than *Bruguier,* it simply does not conflict with *Bruguier.*

Contrary to the State's contention, the South Dakota Supreme Court did not reach out to decide issues broader than those which the case presented. The Court explicitly limited its holding to "the status of *certain lands* lying within the 1858 boundaries of the Yankton Sioux Reservation." (Emphasis added.) *Bruguier* at 365.[1] Any analysis by the Court beyond what was necessary to resolve whether the State had jurisdiction over the "certain lands" at issue is mere dicta.

The lands at issue consisted of a former Indian trust allotment, in Pickstown, South Dakota, upon which Mr. Bruguier committed a crime. Mr. Bruguier brought a habeas corpus petition, arguing that the State did not have jurisdiction over his conduct on the former allotment. The Court therefore only needed to determine jurisdiction over the land on which the offense occurred. The opinion explicitly stated that the land in question was a former trust allotment which had passed to non-Indian ownership. The State Supreme Court noted that:

---

[1] Similar to the federal courts, South Dakota holds that "in determining whether any decision is an authority upon a given proposition of law, it is necessary to ascertain the exact point that was under consideration when that decision was rendered." *Cain v. Ehrler,* 153 N.W. 941 (S.D. 1915).

> The parties stipulated that the offense occurred on allotted land *to which Indian title had been extinguished*. . . . The [lower State] Court found that the place where the offense was committed lies on formerly allotted land, "the Indian title to which has been long extinguished [and] is now held in fee title by non-Indians."
>
> . . .
>
> Although a substantial portion of the site on which Pickstown rests is former allotment land, none of it is now held by the Tribe or in trust.

Id. at 366, 367. (Emphasis added.)

In rendering its holding, the State Court expressly limited its holding to former allotments. The Court wrote:

> Today we proceed further [than prior State Court holdings which limited themselves to the issue of jurisdiction of ceded lands] to decide the jurisdictional status of *former* allotments.
>
> . . .
>
> We conclude that Pickstown is not Indian country under 18 U.S.C. § 1151.

Id. at 378. (Emphasis added.)

The South Dakota Supreme Court's limited holding is identical to the holding of the Court of Appeals in *Yankton II*. There, the Court held:

> For these reasons, we hold that the Yankton Sioux Reservation has not been disestablished, but that it has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands. These lands are not part of the Yankton

> Sioux Reservation and are no longer Indian country within the meaning of 18 U.S.C. § 1151.

Yankton II at 1030. Applying this holding to the situation at issue in *Bruguier* calls for the same result reached by the Court in *Bruguier*: because Pickstown is on allotted lands which are no longer in Indian hands, that land is not Indian Country under 18 U.S.C. § 1151, and, therefore, the State has jurisdiction over Mr. Bruguier's crime.

Perhaps because the State cannot rely upon the holding in *Bruguier* to support its petition, the State instead bases its argument upon dicta which it misinterprets. In *Bruguier*, the Court stated that the location of the criminal offense "is not situated within the boundaries of a reservation because the Yankton Sioux Reservation was *effectively terminated* by the 1894 Act." *Id.* at 378. (Emphasis added.)

The State's reliance upon this section is misplaced for three reasons. First, the above quotation is dicta. As discussed above, the *Bruguier* Court limited its holding to the issue before it, and its broader pronouncements are not the holding of the case. The Court did not need to determine whether the Reservation was disestablished to determine if it had jurisdiction over a former allotment which was owned in fee by non-Indians.[2] Under Rule 10 of this Court, the alleged conflict between a Court of Appeals' ruling and State Court's dicta is not sufficient cause to grant a writ of certiorari.

---

[2] The State Court could not have exercised broader jurisdiction, as it did not have all parties necessary for such adjudication, and such adjudication would have conflicted with the ongoing federal litigation in this matter.

Secondly the State incorrectly equates the *Bruguier* Court's use of the term "effectively terminated" with use by the federal courts of the term "disestablished." The State argues that *Bruguier* conflicts with *Yankton II* because *Bruguier's* dicta says the Reservation was "effectively terminated" while *Yankton II* holds the Reservation was not disestablished or terminated.[3] The implicit premise in the State's argument is that the State Court's term "effectively terminated," is equivalent to the Court of Appeals' use of the term "disestablished."[4]

---

[3] The Court in *Bruguier* did not explain why it added the qualifying term "effectively" to its dicta. Notably, in the State's petition here, it simply removed that word from its paraphrase of the State Court's discussion. The word "effectively" appears to relate to the fact that the very issue which the State wants this Court to review is of no legal or practical importance. As discussed in detail in section IV of this response, jurisdiction is based upon whether the land is "Indian Country," under 18 U.S.C. § 1151(a), (b), or (c), not whether it is Reservation. As the *Bruguier* Court noted, Indian trust allotments and the former Federal Reserve are under tribal and federal jurisdiction regardless of whether they are denominated Reservation. The State's point about whether they are Reservation does not relate to jurisdiction over land and is a purely academic issue.

[4] In both of its opinions in this matter, the Court of Appeals has noted that the State mistakenly equated the related legal concepts of diminishment and disestablishment. 188 F.3d 1010, 1017; 99 F.2d 1439,1443 n.4. The State now argues for certiorari based upon its continued failure to distinguish these legal concepts.

The State's confusion of these terms is also demonstrated by their citation to *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977) and *State v. Thompson*, 355 N.W.2d 349 for the proposition that the State Court has found the Yankton Sioux Reservation disestablished. This Court itself has stated that the holdings of *Winckler* and *Thompson* are contrary to the State's interpretation.

This implicit premise is not valid. The *Bruguier* Court clearly defines the term "terminate:"

> If the only Indian country remaining is land the Yankton Tribe acquired long after the 1894 Act, along with remaining Indian owned allotments under 1151(c), then the Yankton Sioux Reservation may be considered congressionally terminated.

Bruguier at 371.

In other words, the *Bruguier* Court used "terminate" to mean that the U.S. and Tribe have jurisdiction over allotments which remained in Indian hands and the former Federal Reserve. The Court of Appeals' uses different terminology, calling the reduction in jurisdiction

---

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 358 (1998). Both *Winckler* and *Thompson* reaffirmed that "In *State v. Williamson*, 87 S.D. 512, 211 N.W.2d 182 (1973) this Court held that the Act of 1894 disestablished *that portion* of the Yankton Sioux Reservation which was ceded and sold." (Emphasis added.) *State v. Thompson*, 355 N.W.2d at 350. In *Thompson* the State Court was again using disestablish to mean diminish, and the State's petition again fails to note the distinction. *Winckler*, *Thompson*, and *Williamson* are holdings on the status of lands which were ceded in 1894, and the Court limits its holding to that issue. The *Bruguier* holding acknowledged the limitation of the prior holdings, and explicitly stated that it was going beyond the prior case law to reach the status of former allotments which passed to non-Indians. In fact *Thompson* cites with approval the discussion in *Williamson* that implies that the Yankton Sioux Reservation continues to exist. In *Williamson* the Court stated that, in 1894 the ceded lands were "severed from the Reservation," which clearly implies that the Reservation was diminished, but not disestablished.

"diminishment," *Yankton II* at 1018, but the effect is identical. Like the State Court, the Court of Appeals holds that the Tribe retains jurisdiction to 1) the land reserved from sale under section VIII of the 1894 Act, and 2) the Indian allotments which remain in Indian hands.

Use of different terminology by state and federal courts is not adequate grounds for granting a writ of certiorari. The State Court ruling clearly delineates land over which the State has jurisdiction, and that decision is identical to the Court of Appeals' ruling on that issue. There is therefore no conflict and no basis for review of that issue by this Court under this Court's Rule 10.

Third, and most important for purposes of determining whether to grant a writ of certiorari, even if the *Bruguier* Court held that the Reservation had been disestablished and the Court of Appeals did not, this would not create a conflict between the Courts with regard to jurisdiction over land. As discussed in Section IV of this response, the issue of legal consequence in this case is not whether the label "Reservation" can be attached to a small area of land in South Dakota. The Court's role in this matter is to determine jurisdiction over that land. *Yankton II* at 1017. ("The question here is one of jurisdiction"). Regardless of the label used, *Bruguier* and *Yankton II* both hold that the Tribe and U.S. have jurisdiction over the former Federal Reserve and allotments which remain in Indian hands, and that the State has jurisdiction over ceded lands and former allotments which are now in non-Indian hands. *Bruguier* at 371; *Yankton II* at 1030. As discussed in Section IV of this response even assuming the State's interpretation of *Bruguier*, the decision would not alter jurisdiction over land, and so there is no reason

to revisit the question of whether the land can be denominated "Reservation."

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH *DECOTEAU V. DISTRICT COUNTY COURT*

In its petition for a writ of certiorari, the State argues that the Court of Appeals' decision is in conflict with *DeCoteau v. District County Court*, 420 U.S. 425 (1975). The State's argument, however, is not that the Court of Appeals' decision is in conflict with the law stated in *DeCoteau*. The State's contention is merely that the present case is factually indistinguishable from *DeCoteau*, and the State wants to re-litigate, before this Court, the factual distinctions found by the District Court and affirmed by the Court of Appeals. The State is incorrect. The present case has been definitively distinguished from *DeCoteau*, and this Court should not grant certiorari to re-analyze the specific facts of this case.

A. The Court of Appeals applied the correct legal test to determine whether the Yankton Sioux Reservation has been disestablished.

Under this Court's Rule 10, "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Notwithstanding this clear warning, the State bases section IIA of its petition on alleged factual errors and errors in application of a properly stated rule of law. The determination of whether

the Reservation was disestablished entails an examination of multiple factors, including the understanding of the parties at the time of the agreement, the negotiations that led to the agreement, the specific provisions of the agreement, and the subsequent history of the area. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (hereinafter *Yankton I*); *Hagen v. Utah*, 114 S.Ct. 958 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962). In these cases, this Court has repeatedly discussed the factors to be considered and the weight to be accorded to each factor, so that lower courts have clear guidance on how to determine if a Reservation has been disestablished. The State does not argue that this Court should overrule these cases, and there is no need for the Court to revisit this established and settled law.

In *Yankton II*, the Appellate Court stated and applied the correct legal test for determination of whether a reservation has been disestablished. Significantly, the State's petition for a writ of certiorari does not even allege that the Court of Appeals misstated the legal test. The bulk of the Court of Appeals' opinion is its detailed analysis of the application of the appropriate test to the unique facts of this case. The Court of Appeals found that some factors weighed in favor of finding the Reservation disestablished, and some factors weighed against disestablishment. The Court of Appeals' decision closely followed this Court's discussion in *Yankton I*, which noted the factors which weighed on each side of the issue, and the weight which was to be accorded those factors. In

conclusion, the Court of Appeals found that the balance tipped in favor of finding the reservation diminished, but not disestablished. The State's position is that, under the test established by prior Supreme Court case law and applied by the Court of Appeals in this case, the Court of Appeals should have arrived at a different ultimate conclusion.

The State invites the Court to grant certiorari so that this Court can reapply the same test the Appellate and District Courts applied, to see if this Court comes to the same conclusion as the lower courts. If the Court did grant certiorari, its decision on the State's petition would not establish any new law: the decision would only apply that settled law to the specific, unique facts of the 1894 Act at issue in this matter. The Supreme Court should decline the State's invitation.

B. The instant case is not one of the rare cases which this Court should review based upon an alleged misapplication of a correct legal test or alleged erroneous findings of fact.

The State bases its request for a writ of certiorari on its disagreement with the Court of Appeals' conclusions that this matter is factually and legally distinguishable from *DeCoteau*. The Court of Appeals found three factual and legal distinctions. Those differences, when applied to the applicable legal standards, do not give rise to a showing of clear and concise congressional intent to disestablish the Reservation.

The most important distinction between this matter and *DeCoteau* is that the Sisseton, but not the Yankton,

expressed a desire to terminate their reservation. *Yankton II* at 1020. The Court of Appeals' decision on this point mirrors the District Court's decision, which discussed the issue in greater detail. 14 F. Supp. 2d at 1157. As it has done throughout this appeal, the State continues to disagree with this factual finding. The State argues the factual finding is not supported by sufficient evidence and the State cites other evidence which it argues is contrary to the finding. *State's Petition for Writ of Certiorari* at 19.

The finding is not a conclusion of law, nor does the State argue that the factual finding is contrary to any precedent of this Court. Because the finding is clearly supported by evidence, this Court should not review or reverse the finding. This factual disagreement is not a basis for a writ of certiorari. It is the settled finding of this case which unequivocally distinguishes this case from *DeCoteau*.[5] Thus, the Court of Appeals correctly determined that this legally settled difference between the Lake Traverse Reservation and the Yankton Reservation weighed in favor of finding that the Yankton Reservation was not disestablished.

The Court of Appeals also found that "the content and wording of the agreements are very different, aside from the particular cession language the Supreme Court compared in *Yankton*. Compare 26 Stat. 1036-38, with 28

---

[5] The Tribe's position is further that the State's question presented does not allege erroneous factual findings. Under Supreme Court rules the State therefore cannot argue that the factual finding is in error. Because the finding is amply supported, it is unnecessary to determine whether the State preserved for review the alleged erroneous factual finding.

Stat. 314-18." *Yankton II* at 1020. The State again simply disagrees with the Court of Appeals' analysis of the negotiation history, and that disagreement with the lower court's analysis does not merit review by this Court. The Court of Appeals properly assigned the appropriate weight to the unique negotiation history of the Yankton agreement.

The Court of Appeals sets forth in detail the facts upon which it based its decision, the factors it considered, the weight given to those factors, and the Court's conclusion. The decision shows that the Court took great care to properly apply the correct legal test. Under this Court's rule 10, the State's disagreement with the lower Courts' findings of facts and weighing of factors is not grounds for granting a writ of certiorari.

III. THE COURT OF APPEALS' HOLDING THAT THE RESERVATION INCLUDES LAND RESERVED FROM SALE BY THE U.S. IN 1894 IS CONSISTENT WITH *YANKTON I*

In section IIB of its petition, the State argues that *Yankton I* held that the 1,000 acres[6] of land reserved by the United States in 1894 for agency purposes was not

---

[6] In its petition for a writ of certiorari, the Tribe uniformly used acreage estimates by the Court of Appeals in *Yankton II*. The Court of Appeals estimated a Federal Reserve of up to 6,000 acres. The Tribe will hereinafter use the State estimate of a 1,000 acre Federal Reserve, as that estimate appears closer to the actual acreage. *See* 14 F. Supp. 2d 1154 (Federal Reserve of 1,252.89 acres. A July 27, 1892 letter stated that the Federal Reserve was 852 acres.)

part of the Reservation. The Tribe ceded these 1,000 acres to the U.S. under the 1894 agreement, with the understanding that:

> Such part of the surplus lands hereby ceded and sold to the United States as may now be occupied by the United States for agency, schools, and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes.

28 Stat. 314-318, Article VIII.[7]

The State mistakenly argues that the 1,000 acres were "ceded" as that term is used in the following holding of this Court: "We now reverse the Eighth Circuit's decision and hold that the unallotted lands ceded as a result of the 1894 Act did not retain reservation status." *Yankton I* at 342. While the State's argument appears, at first blush, to be valid, this is only because the State fails to distinguish between the two uses of the word "ceded" in *Yankton I*. Depending on the context, this Court used the term "ceded" to mean: 1) the land ceded under Article I of the 1894 Act; or 2) the surplus land opened for settlement.

In *Yankton I*, this Court sometimes used the term "ceded land" to refer to the land which was ceded and then put up for sale as surplus property. For example, the Court wrote, "President Cleveland issued a proclamation opening the ceded lands to settlement as of May 21, 1895,

---

[7] The legally accurate way to describe this transaction is that, prior to 1894, the lands were held by the U.S. as tribal trust, and that from 1894 to 1929, the lands were held by the U.S. as reserved land. In 1894, the Tribe transferred some of their interest in the land to the United States.

and non-Indians rapidly acquired them." *Id.* at 339. In the above quotation, the Court obviously did not mean that "ceded land" included the 1,000 acres ceded by the Tribe but retained by the federal government under Article VIII. The 1,000 acre Federal Reserve was not opened for settlement.

In the present matter, the Court of Appeals had to determine which of the meanings of "ceded land" this Court meant in the holding relied upon by the State. The Court of Appeals' holding is a clarification of an ambiguity in *Yankton I*. The issue raised is not relevant to disestablishment of the reservation and is not contrary to the quoted holding in *Yankton I*, and so is not grounds for a writ of certiorari.

IV. THE ISSUES RAISED IN THE STATE PETITION FOR A WRIT OF CERTIORARI LACK BROAD IMPORTANCE

A. The issue raised by the State does not affect jurisdiction over land.

The State's petition for a writ of certiorari primarily raises a theoretical question with regard to a small amount of land in a remote, sparsely populated area of the United States. The issue which the State raises lacks significant practical importance to anyone other than Yankton Sioux tribal members.[8] The question presented

---

[8] The issue is of cultural or psychological importance to the Tribe. To the Tribe, there is a large difference between having a Reservation and not having a Reservation, even though that distinction does not affect jurisdiction or any tangible right.

by the State of South Dakota is "whether an 1894 statute . . . disestablished the Yankton Sioux Reservation." The importance of this litigation, since its inception, has been that the parties are asking the federal courts to determine which sovereign has jurisdiction over the lands which were the Yankton Sioux Reservation prior to 1894. Jurisdiction is not mentioned in the State's question presented, because the issues raised by the State do not bear upon which sovereign has jurisdiction. In its decision, the Court of Appeals determined that trust allotments which remain in Indian hands are part of the Reservation, and that the former Federal Reserve is part of the Reservation.[9] As discussed below, even if the Court were to grant the writ of certiorari, reverse the factual findings of the trial Court, reweigh the factors under the legal standard applied by the Court of Appeals, and then agree with the State that the Reservation was disestablished, federal and tribal jurisdiction would be the same as under the current Court of Appeals' ruling.

---

[9] The Court remanded for determination of whether lands held by Indians in fee remain part of the Reservation, and left open other legal issues related to the status of lands which passed to non-Indians in manners other than as intended by Congress in 1894. The issues which the Court of Appeals remanded are not yet ripe for review, and are not included as issues in the State's petition. Because the Court of Appeals left several issues as yet unresolved and not ripe for Supreme Court review, it may be appropriate to remand this matter for resolution of those issues, so that the full case would be ripe for Supreme Court review at one time, rather than, as currently appears likely, having the remanded issues presented to this Court in separate petitions for review.

Similarly, even if the Court agreed with the State's interpretation that *Bruguier v. Class* held the Reservation disestablished as that term of art is used in federal case law, jurisdiction under *Bruguier* would be identical to jurisdiction under the challenged Court of Appeals' holding.

With regard to the allotments, the issue raised by the State's petition is merely whether the U.S. and Yankton Sioux Tribe's unquestioned jurisdiction over allotments is based upon both 18 U.S.C. § 1151(a) and 18 U.S.C. § 1151(c), or whether jurisdiction is only based upon 18 U.S.C. § 1151(c). The United States has jurisdiction over Indian Country as that term is defined in 18 U.S.C. § 1151, and there is no legal distinction between the jurisdiction conferred by the three subsections of 18 U.S.C. § 1151. The statute states in full:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter [18 USCS §§ 1151 et seq.], means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

There is substantial overlap between lands which qualify as Indian Country under 18 U.S.C. § 1151(a), 18 U.S.C. § 1151(b) and 18 U.S.C. § 1151(c). For example, most allotments are within the boundaries of a Reservation, and so the U.S. can assert jurisdiction over that land under 18 U.S.C. § 1151(a) and/or 18 U.S.C. § 1151(c).

In this matter, the Court of Appeals found that the allotted lands which remained in Indian hands constituted part of the Yankton Sioux Reservation, and so the Tribe had jurisdiction over those lands under 18 U.S.C. § 1151(a). It is undisputed that, even if the Reservation was disestablished, the Tribe and U.S. would still have jurisdiction over those allotments. *Yankton II* at 1017. ("The parties agree that the Tribe has jurisdiction over allotted lands still held in trust by the federal government. The State, the District, and the individual state and county officials assert, however, that this jurisdiction falls under 18 U.S.C. § 1151(c).")

There are therefore two independent bases to support the Court of Appeals' determination that the Tribe has jurisdiction over the allotted lands: 18 U.S.C. § 1151(a) and 18 U.S.C. § 1151(c). The State challenges one basis for jurisdiction, but does not challenge that the U.S. and the Tribe have jurisdiction over allotments. One basis for jurisdiction is enough, and therefore the State's petition does not raise a legal issue with regard to allotted lands. *See also, Bruguier* at 371 (Court states former Federal Reserve and allotments are within federal tribal jurisdiction under 18 U.S.C. § 1151(c), and State Court therefore does not inquire whether jurisdiction to such land could also be based upon 18 U.S.C. § 1151(a).)

Similarly, with regard to the former Federal Reserve, if the State were to prevail in the issue it seeks to present, the decision would not affect the status of the Federal Reserve: the Tribe would have jurisdiction over the Reserve. The State's argument regarding that Federal Reserve is only that it cannot be denominated Reservation, and the State concedes it is tribal trust land. As the District Court clearly held, the U.S. and Tribe have jurisdiction over that trust land regardless of whether it is "Reservation" under 18 U.S.C. § 1151(a). 14 F. Supp. 2d 1160. That decision was not appealed or reversed and it is not brought before this Court in the State's petition for a writ of certiorari. It is *res judicata*.

B. The amount of land at issue in the State's petition is small.

The Court of Appeals estimated that, under its ruling, the Reservation contains approximately 36,000 acres. As discussed above, the issue presented by the State does not affect jurisdiction, legal rights, or ownership of those 36,000 acres. The only effect of a ruling in favor of the State would be to change the label applied to 36,000 acres of land, in a remote, sparsely populated area of the United States. The label applied to such a small parcel of land is not a matter which should command the attention of this Court. Even if that label did affect jurisdiction of some or all of that small area of land, the matter would not be of sufficient importance to merit Supreme Court review.

C. The State's other allegations of potential effects do not provide cause to grant a writ of certiorari.

On pages 27-28 of its petition for a writ of certiorari, the State makes several brief allegations of possible effects of the Court of Appeals' ruling. Significantly, the State does not argue that *Yankton II* is binding or even pursuasive authority for any of the possible effects it discusses. The alleged effect is that the decision "will be argued" or "might be argued" as precedent for the various propositions, *State's Petition* at 27. Most of the State's allegations relate to the Court of Appeals' decision that the Federal Reserve is part of the Reservation. As with any Court of Appeals' opinion, *Yankton II* will have some effect on other cases. In the present matter, such effect will be less than in most other Court of Appeals' cases, because the holding does not establish any new law. It merely applies this Court's prior decision to the unique facts of the 1892 Yankton agreement. Because there are no similarly situated tribes, the complained-of holding will have very limited effect, and any effect it will have derives from this Court's cases upon which it is based.

The State wrongly alleges the Court of Appeals' decision could be used to overturn *DeCoteau's* determination that the Lake Traverse Reservation was wholly disestablished. As discussed above, the Court of Appeals cited *DeCoteau* with approval and distinguished the Yankton agreement from that in *DeCoteau*. Moreover, a Court of Appeals' decision is not precedent to overturn a settled holding of this Court.

The State similarly argues the Court of Appeals' decision could overturn this Court's decision in *Rosebud Sioux Tribe v. Kneip*. Again, *Kneip* is settled case law of this Court, cited by the Court of Appeals with approval, and involving an agreement quite different from the Yankton agreement.

The State then broadly asserts that the Court of Appeals' decision will cause tribes throughout the nation to try to have federal reserve land denominated Reservation. Under Supreme Court case law, such tribes would not be situated similarly to the Yankton Sioux Tribe. Moreover, as in the captioned matter, for any similarly situated federal reserve, the Court of Appeals' ruling would not change jurisdiction over such Reserve. As at Yankton, any similarly situated Reserve is under tribal and federal jurisdiction regardless of whether it is Reservation.

Finally, the State argues:

> [T]he suggestion of the panel that mere "trust" or "allotted" lands in diminished or disestablished reservations might retain or somehow have been revested with "reservation status" will likewise raise difficulties in every area subjected to disestablishment or diminishment.

This final paragraph of the State's petition is based upon a contortion of *Yankton II* which is far beyond the bounds of proper legal argument, and far beyond the bounds of the question they present. The Court of Appeals devoted nearly its whole opinion to discussion and application of the long-settled case law for determination of whether a Reservation which has been allotted has also been disestablished. The Court looked to

many factors besides the fact that the Reservation was allotted. The Court cited with approval *DeCoteau* (allotments not part of Reservation which was disestablished) and *Kneip* (allotments in area severed from Reservation are not part of the Reservation), both of which directly contradict what the State argues is the "suggestion of the panel." The panel did not in any way suggest that the only factor of importance was whether the reservation was allotted.

CONCLUSION

At the beginning of its relationship with non-Indians, the Yankton Sioux Tribe controlled a vast area in what is now the Midwest of the United States. By agreements, by requests, by force, by duress, by dishonest conduct, by cheating, the lands of this once powerful Tribe have been reduced to a small area of land which is within federal and tribal jurisdiction.

The State brings its petition for a writ of certiorari, asking that this Court eliminate the last vestige of the Tribe's Reservation. The State asks for disestablishment, not to increase State jurisdiction, because the State's argument does not affect jurisdiction. As stated, even if the Court agreed with the States' interpretation that *Bruguier* held the Reservation disestablished, as that term of art is used in federal case law, jurisdiction under *Bruguier* would be identical to jurisdiction under the challenged Court of Appeals' ruling. Whatever the motives of the State, the grounds stated in their petition do not meet the standard for granting a writ for certiorari by this Court.

The Court should not devote its time and energy to determine whether there are two or whether there is only one basis for federal and tribal jurisdiction over a small, remote, rural area of the United States. The Court should deny the State's petition asking the Court to disestablish the Yankton Sioux Reservation.

Respectfully submitted,

MARY T. WYNNE
Counsel of Record
212 N. 2nd Avenue, Suite 205
Okanogan, WA 98840
(509) 422-6267
Counsel for Respondent
Yankton Sioux Tribe

(3)

No. 99-1490

Supreme Court, U.S.
FILED
MAY 8 - 2000
CLERK

IN THE

Supreme Court of the United States

STATE OF SOUTH DAKOTA; WILLIAM JANKLOW, Governor of South Dakota; MARK W. BARNETT, Attorney General of South Dakota; SCOTT PODHRADSKY, State's Attorney of Charles Mix County; HERMAN PETERS, Member of the Charles Mix, South Dakota, County Commission; BRUCE BAKKEN, Member of the Charles Mix, South Dakota, County Commission; JACK SOULEK, Member of the Charles Mix, South Dakota, County Commission; SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Petitioners,

v.

YANKTON SIOUX TRIBE, and its individual members; UNITED STATES OF AMERICA, on its own behalf and for the benefit of the Yankton Sioux Tribe; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF CITIES DANTE, GEDDES, LAKE ANDES, PICKSTOWN, PLATTE, RAVINIA AND WAGNER, *AMICI CURIAE*, IN SUPPORT OF PETITIONERS STATE OF SOUTH DAKOTA, CHARLES MIX COUNTY AND SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT

TIMOTHY R. WHALEN
Counsel of Record
WHALEN LAW OFFICE, P.C.
P. O. Box 127
Lake Andes, SD 57356
(605) 487-7645

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

300 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	8
I. THE SHIFTING ARGUMENTS OF THE UNITED STATES ARE WITHOUT MERIT	8
A. NOTHING IN THE YANKTON DOCUMENTS INDICATED THAT ARTICLE XVIII OF THE 1894 ACT WAS INTENDED TO ALTER THE FUNDAMENTAL ATTRIBUTES OF THE YANKTON CESSION	8
B. THE CONCESSIONS OF THE UNITED STATES IN YANKTON I WITH REFERENCE TO DISESTABLISHED RESERVATION BOUNDARIES ARE SIGNIFICANT AND CONTROLLING HERE	10
C. THIS COURT HAS MADE CLEAR THAT THE 1858 RESERVATION BOUNDARIES OF THE YANKTON RESERVATION WERE NOT MAINTAINED	12
1. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998)	12
2. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (D.S.D. 1998) rev'd 188 F.3d 1010 (8th Cir. 1999) petition for cert. filed (U.S. Mar. 7, 2000) (No. 99-1490)	15

TABLE OF CONTENTS—Continued

Page

3. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999) petition for cert. filed (U.S. Mar. 7, 2000) (No. 99-1490).. 16

D. THE FACT THAT THE UNITED STATES HAS DECIDED NOT TO FILE A PETITION IS IMPORTANT. 20

CONCLUSION 20

APPENDIX

Brief of Charles Mix County, South Dakota, Amicus Curiae, in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581) 1a

Memorandum for the United States, *Seymour v. Superintendent*, 368 U.S. 351 (1962) (No. 8 Misc.) 34a

Brief for the United States as Amicus Curiae, *Mattz v. Arnett*, 412 U.S. 481 (1973) (No. 71-1182) 37a

Brief for the United States as Amicus Curiae, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148) 60a

Brief for the United States as Amicus Curiae, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) 88a

Brief for the United States as Amicus Curiae Supporting Respondent, *Solem v. Bartlett*, 465 U.S. 463 (1984) (No. 82-1253) 131a

Brief for the United States as Amicus Curiae Supporting Petitioner, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 161a

TABLE OF CONTENTS—Continued

Page

Brief for the United States in Opposition, *Yankton Sioux Tribe v. State of South Dakota,* 796 F.2d 241 (8th Cir. 1986), (No. 86-1436) *cert. denied,* 483 U.S. 1005 (1986) 190a

Brief for the United States as Amicus Curiae Supporting Respondents, *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329 (1998) (No. 96-1581) 202a

Transcript of Oral Argument at 13-21, *Mattz v. Arnett,* 412 U.S. 481 (1973) (No. 71-1182) 233a

Transcript of Oral Argument at 9-24, *Erickson v. Feather* decided with *DeCoteau v. District County Court,* 420 U.S. 425 (1975) (No. 73-1148) 239a

Transcript of Oral Argument at 18-30, *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977) (No. 75-562) 250a

Transcript of Oral Argument at 18-27, *Hagen v. Utah,* 510 U.S. 399 (1994) (No. 92-6281) 259a

Transcript of Oral Argument at 43-52, *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329 (1998) (No. 96-1581) 266a

TABLE OF AUTHORITIES

CASES: Page

Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998) 14

Bruguier v. Class, 599 N.W.2d 364 (S.D.1999).... 3

DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... *passim*

Hagen v. Utah, 510 U.S. 399 (1994) 1, 3, 8

Mattz v. Arnett, 412 U.S. 481 (1973) 3

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).....1, 3, 14

Seymour v. Superintendent, 368 U.S. 351 (1962).. 3

Solem v. Bartlett, 465 U.S. 463 (1984)..... 3, 5

South Dakota v. Bourland, 508 U.S. 679 (1993)... 7

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998)..... *passim*

United States v. Dion, 752 F.2d 1261 (8th Cir. 1985) *rev'd in part by, United States v. Dion*, 476 U.S. 734 (1986)..... 5

Washington v. Yakima Indian Nation, 439 U.S. 463 (1979)..... 7

United States v. Pelican, 232 U.S. 442 (1914) 14

Yankton Sioux Tribe v. Southern Missouri Waste Dist., 99 F.3d 1439 (8th Cir. 1996)..... 9

Yankton Sioux Tribe v. Gaffey, No. 98-4042 (D.S.D. Oct. 5, 1998) (order denying motion for new trial) 15

Yankton Sioux Tribe v. Gaffey, 14 F.Supp.2d 1135 (D.S.D. 1998) *rev'd* 188 F.3d 1010 (8th Cir. 1999) *petition for cert. filed* (U.S. Mar. 7, 2000) (No. 99-1490) 15

Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999) *petition for cert. filed* (U.S. Mar. 7, 2000) (No. 99-1490).....16, 18, 19

TABLE OF AUTHORITIES—Continued

STATUTES: Page

Act of August 15, 1894, 28 Stat. 286 5
18 U.S.C. §1151 ..... 13, 14

OTHER AUTHORITIES:

Supreme Court Rule 37(4) 1
Brief for the United States as Amicus Curiae supporting Respondent, *Solem v. Bartlett*, 465 U.S. 463 (1984) (No. 82-1253) 5
Brief for the United States, *Yankton Sioux Tribe v. South Dakota*, 796 F.2d 241 (8th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1986) 5
Brief for United States as *Amicus Curiae* in Support of Plaintiffs-Appellees, *South Dakota v. Yankton Sioux Tribe*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647) 17
Brief of Charles Mix County, South Dakota in Support of Petitioner, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581) 4, 5
Brief for the United States as *Amicus Curiae* Supporting Respondents, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581) 6, 18
Transcript of Oral Argument, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 8
Transcript of Oral Argument, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581) 6, 10-11
Summary Judgment Brief for the United States, *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (D.S.D. 1998) (No. 98-4042) 16

TABLE OF AUTORITIES—Continued

Page

Brief of Plaintiff-Intervenor/Appellee United States of America, *Yankton Sioux Tribe v. Gaffey,* 188 F.3d 1010 (8th Cir. 1999) (Nos. 383893, 3894, 3896, 3900) 14, 17, 20

Brief for Southern Missouri Waste Management Dist., *Yankton Sioux Tribe v. Gaffey,* 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900) 20

Motion for Stay Pending Petition for Writ of Certiorari, *Yankton Sioux Tribe v. Gaffey,* 188 F.3d 1010 (8th Cir. 1999) (No. 98-3893, 3894, 3896, 3900) 19

Petition for Writ of Certiorari, *South Dakota v. Yankton Sioux Tribe,* No. 99-1490, (Mar. 7, 2000) 3

James M. Bekken, Comment, *Indians—Reservations-Jurisdictional Effect of Surplus Land Statute Upon Traditional Boundaries of an Indian Reservation*, 52 N.D. L. Rev. 411 (1975) 13

Susan D. Campbell, *Reservations: The Surplus Lands Acts and the Question of Reservation Disestablishment*, 12 Am. Ind. L. Rev. 57 (1984) 13

INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37(4), the Cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, respectfully submit this brief as *amici curiae*, in support of Petitioners State of South Dakota, Charles Mix County, and Southern Missouri Waste Management District. Five of the *amici* Cities, Wagner, Lake Andes, Ravinia, Dante and Pickstown are located within the 1858 boundaries of the Yankton reservation. Every one of these Cities is situated, in whole or in part, on the former allotments now held in fee, that are squarely at issue here. Two of the *amici* Cities, Geddes and Platte, lie close to the 1858 boundaries. Each of the Cities has operated, since its founding a few years after the 1894 Yankton Act, as if no reservation boundaries exist.

The vital concern that prompts the filing of this *amici curiae* brief can be simply stated. Prior to this litigation, all the courts and parties had recognized that the 1858 Yankton reservation no longer existed. Now, a century later, a large portion of the area of Charles Mix County, South Dakota, including, in whole or in part, the *amici* Cities of Dante, Geddes, Lake Andes, Pickstown, Ravinia and Wagner, is still at issue. Consequently, the approximately 6,000 people that reside in this area still face the prospect of being suddenly thrust into the status of residents of an Indian reservation.

Here, ninety percent (90%) of the land is owned by non-members and over two-thirds (2/3) of the residents are non-members who reside on small farms and in small towns and cities like Dante, Lake Andes, Pickstown, Ravinia, and Wagner. In all, there are forty-nine (49) political subdivisions within the county.

The expectations of the people in this area should not be lightly regarded or simply set aside. *Hagen v. Utah*, 510 U.S. 399, 421 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356-357 (1998). Nevertheless, the United States

has consistently ignored this prudential consideration. For these reasons, the issue is of grave importance to the residents, the Cities and the other units of local governments in Charles Mix County, South Dakota.

It is profoundly disturbing that reservation status is even a possibility after this Court unequivocally rejected the argument of the Yankton Sioux Tribe and United States that would have resurrected the 1858 reservation boundaries in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (*Yankton I*). This *amici curiae* brief of the Cities will focus on the role that the relentless advocacy of the United States has played in this process in this case, and in other similar cases.

Importantly, the United States did not even file a Petition for Certiorari in this case when it was due on May 2, 2000. This recent development is especially noteworthy in light of the fact that on remand, the United States was granted leave to intervene as a plaintiff in this litigation. The arguments the United States submitted thereafter caused additional conflict and confusion.

Clearly, the United States does not consider that the rejection of the arguments submitted by the United States and the Yankton Sioux Tribe in the court of appeals, present this Court with a question that is certworthy. This is a significant concession by the United States even if the United States subsequently supports, in any fashion, the Petition filed by the Yankton Sioux Tribe.

Moreover, although the *amicus curiae* brief that follows, for the most part, was drafted prior to the recent decision of the United States to not file a Petition in this case, it is still significant because it summarizes the advocacy of the United States in cases of this kind and sheds light on the unprecedented nature of this decision of the United States. The argument also provides a perspective from which any subsequent submission by the United States in this case

should be viewed. All of this further supports the Petition for a Writ of Certiorari filed by the State of South Dakota, Charles Mix County and Southern Missouri Waste Management District.

SUMMARY OF ARGUMENT

The Cities fully support the position set forth in the Petition for Writ of Certiorari of the State of South Dakota, Charles Mix County and Southern Missouri Waste Management District. Pet. for Writ of Cert., *South Dakota v. Yankton Sioux Tribe*, No. 99-1490, (Mar. 7, 2000). The Cities agree that the decision of the panel conflicts squarely with the relevant decisions of the Supreme Court of the State of South Dakota and this Court.[1] This brief will address the role of the United States in the entire process.

A fair reading of *Seymour v. Superintendent*, 368 U.S. 351 (1962), *Mattz v. Arnett*, 412 U.S. 481 (1973), *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *Solem v. Bartlett*, 465 U.S. 463 (1984), *Hagen v. Utah*, 510 U.S. 399 (1994) and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), clearly undermines the continuing reservation status of the Yankton reservation recognized by the panel. Petitioners highlight these important principles and, for that reason, they will not be repeated here.

However, a proper perspective regarding the history of this disestablishment litigation before this Court is also important in order to accurately assess the Petitions in conjunction with the principles set forth in these decisions. This brief is intended to serve that purpose and provide that perspective.

---

[1] *Bruguier v. Class*, 599 N.W.2d 364 (S.D.1999). In this light, the Cities further agree that something less than full plenary attention may be appropriate in this instance. *See* Pet. for Writ of Cert., 3 n.2, *South Dakota v. Yankton Sioux Tribe*, No. 99-1490).

In *Yankton I*, Charles Mix County reviewed the primary arguments presented and rejected in each reservation boundary case decided by this Court, as well as the historic perspective available or established at the time. Br. of Charles Mix County, South Dakota in Supp. of Pet'r, *Yankton I*, 522 U.S. 329 (1998) (No. 96-1581). For the convenience of the Court, the Cities have reproduced that brief in the Cities' appendix. *See* County Brief, Cities App. 1a-33a. To complete the perspective, the Cities have also reproduced every brief and oral argument that the United States has submitted in this Court in these cases. Cities App. 34a-189a, 233a-272a.

The County brief recounts in summary fashion the case by case developments in this litigation. *See* County Brief, City App. 6a-20a, 27a-29a. A review of this chronology establishes three overriding themes. First, as one would expect, each time the Court was presented with this issue, more primary sources were available from which a proper historical perspective could be reconstructed and the intent of Congress more conclusively ascertained. The opinions reflect this documentation.

Second, the views of the United States are especially noteworthy. The United States has never failed to advocate the resurrection of original reservation boundaries, presumably because of a perceived obligation to support the tribal position. The shifting, but very sophisticated, arguments of the United States (for the most part repeatedly rejected by this Court) have mainly served to perpetuate the confusion and conflict in this area of federal Indian law, fueling the prospect of additional litigation.

The central arguments of the United States are also closely examined for another reason. As will be seen, the United States has repeatedly made a number of important general concessions in this Court, subsequent to *DeCoteau*, regarding the *effect of cession agreements*, like this one, on Indian

reservations. These *general cession concessions*, made in conjunction with submissions that urged the continued recognition of other original reservation boundaries, cannot be explained away. The views of the United States in this regard, submitted to this Court, merit continued consideration. *See* chronology summarized in County Brief, Cities App. 15a-20a, 27a-29a. *See also* Briefs of United States, Cities App. 88a-189a, Tr. of Oral Arguments, Cities App. 250a-266a.

The County brief also addresses in chronological order, the *specific cession concessions* of the United States regarding the disestablishment of the 1858 Yankton Sioux reservation effected by the passage of the 1894 Yankton Sioux cession act. *See* County Brief, Cities App. 20a-27a. For example, in 1984, the United States formally submitted this Yankton reservation disestablishment concession in the Eighth Circuit Court of Appeals. *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985) *rev'd in part by, United States v. Dion*, 476 U.S. 734 (1986). *Id.* at 20a, 21a. The United States did so in order to maintain a cession distinction in *Solem* essential to its argument there supporting original reservation boundaries. Br. for the United States as *Amicus Curiae* Supp'g Resp't, *Solem v. Bartlett*, 465 U.S. 463 (1984) (No. 82-1253).

Moreover, in other litigation also pending at the same time, and also dealing with the 1858 Yankton Sioux reservation and the 1894 Yankton Sioux cession act, the United States acknowledged that this Court's decision in *DeCoteau* involved "a similar and contemporaneous cession agreement" with "the same language" and "purpose." Br. for the United States, *Yankton Sioux Tribe v. South Dakota*, 796 F.2d 241 (8th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1986), Cities App. 199a, County Brief, Cities App. 26a-27a. Significantly, Article XVIII of the 1894 act that the United States insisted was so important in *Yankton I*, was not mentioned in any of this. Act of August 15, 1894, 28 Stat. 286, 318.

To complete the perspective, the Cities review the briefs and oral argument the United States submitted in *Yankton I*. The Cities have appended the Briefs of the United States and excerpts from the transcripts of the oral argument of the United States in *Yankton I* that highlight the inconsistencies in the position of the United States. Cities App. 202a-232a, 266a-272a. Further, the Cities review the analysis this Court set forth in *Yankton I* that squarely rejected the position of the United States. Finally, the Cities track the argument of the United States since that time and the manner in which the courts below have mistakenly relied upon the representations of the United States in the process of deciding this case.

Because the United States sought an extension of time in two separate instances in this Court, until May 2, 2000, we did not really know what position the United States would ultimately adopt before this Court in this litigation. We now know that the United States will not file a Petition for Certiorari in this Court. Clearly, this is a significant concession.

Past experience suggests that the United States will eventually support whatever argument the Yankton Sioux Tribe chooses to advance. Of course, we could be pleasantly surprised, but nothing in the arguments submitted to date by the United States would support that supposition.

One thing is fairly certain. The United States will not honor the position advanced by the Office of the Solicitor General in this Court in *Yankton I* (i.e. that disestablishment was inevitable if the argument of the United States regarding Article XVIII was rejected and the 1858 Yankton boundaries were not recognized by this Court, because *nothing* in the Yankton documentation supported any other conclusion.) Brief for United States, Cities App. 202a-232a; Tr. of Oral Argument at 270a-271a, *Yankton I*, 522 U.S. 329 (1998) (No. 96-1581), Cities App. 266a. This Court in *Yankton I* did

reject the argument of the United States and the 1858 reservation boundaries were not recognized.

Nevertheless, within days of the *Yankton I* decision, the United States reneged on the inevitable disestablishment argument it presented to this Court, even before the case was remanded to the district court. Since then, the United States has adopted several other conflicting arguments to continue supporting the position of the Yankton Sioux Tribe that the 1858 reservation boundaries should be resurrected. And the fact that the United States has decided not to file a Petition for a Writ of Certiorari does not change any of this.

At some point in time, the "litigating position" of the United States in this type of case should be subject to heightened scrutiny. *South Dakota v. Bourland*, 508 U.S. 679, 697 (1993). *See also Washington v. Yakima Indian Nation*, 439 U.S. 463, 477-478 n.20 (1979) ("[United States] recently changed its position diametrically").

In this regard, the fact that this Court did not extend an invitation to the United States to express the views of the United States at the petition stage in *Yankton I* is hopefully of some significance. The rejection of the position of the United State in *Yankton I* also merits special notation. And clearly, the conflicting arguments the United States has submitted since that time further substantiate the claim that no principled reason exists to give any special credence to the position of the United States in cases of this nature.

ARGUMENT

I. THE SHIFTING ARGUMENTS OF THE UNITED STATES ARE WITHOUT MERIT.

A. Nothing In The Yankton Documents Indicated That Article XVIII Of The 1894 Act Was Intended To Alter The Fundamental Attributes Of The Yankton Cession.

MR. MANN: Well, the language in *DeCoteau* said that the Indians cede, sell, relinquish and convey to the United States all their claim, right, title, and interest in the land in question, and the statute in *Rosebud* stated that the Indians cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all the land in question.

It would be rather difficult, I think, to construe that language as language that allowed the Indians to retain sovereignty over the land.

QUESTION: I think you're probably right. . . .

Tr. of Oral Argument at 25, *Hagen*, (No. 92-6281), Cities App. 263a-264a (emphasis added).

In *DeCoteau*, the United States argued against cession disestablishment and lost. After the decision of this Court in *DeCoteau*, even the United States repeatedly acknowledged that Congress routinely intended cession statutes such as the Yankton cession to disestablish reservation areas. Brief of United States, Cities App. 88a-189a. Before *Yankton I*, the United States did not attempt to circumvent the holding in *DeCoteau* regarding this type of cession, openly acknowledging, as in *Hagen*, that it would be "rather difficult" to support any other construction. *Id.* at 263a-264a.

In *Yankton I*, the United States ignored *DeCoteau* and that traditional cession analysis and advocated the "narrower" position ultimately adopted by the Court of Appeals in

Yankton I. Yankton Sioux Tribe v. Southern Missouri Waste Dist., 99 F.3d 1439, 1448, 1457 (8th Cir. 1996).

Nothing of substance could be cited by either the United States or the panel majority in *Yankton I* to support this anomalous and otherwise "rather difficult" construction. Brief for United States, Cities App. at 32a. Moreover, the prior views of the United States, summarized above, precluded this "narrower" view--at least in the absence of some *affirmative* evidence of congressional intent to the contrary. In this respect, generic arguments loosely tied to the Article XVIII savings clause should not have sufficed. Article XVIII was not intended to alter the fundamental attributes of the Yankton cession--and not a single word in any of the Yankton documentation supported the position of the United States. Nevertheless, the court of appeals was persuaded by the argument of the United States.

This Court in *Yankton I* unanimously rejected the Article XVIII savings clause argument of the United States. First, the Court noted that the holding of the court of appeals keyed on this circuitous argument:

> The court relied *primarily* on the saving clause in Article XVIII, reasoning that, given its "unusually expansive language," other sections of the 1894 Act "should be read narrowly to minimize any conflict with the 1858 treaty." *Id.*, at 1447.

Yankton I, 522 U.S. at 342 (emphasis added).

This Court then disposed of the argument in no uncertain terms:

> The United States urges a similarly "holistic" construction of the agreement, which would presume that the parties intended to modify the 1858 Treaty only insofar as necessary to open the surplus lands for settlement, without fundamentally altering the treaty's terms.
>
> Such a literal construction of the saving clause, as, the South Dakota Supreme Court noted in *State v. Greger*,

> 559 N.W. 2d 854, 863(1997), would "impugn the entire sale.". . . .
>
> Moreover, the Government's contention that the Tribe intended to cede some property but maintain the entire reservation as its territory contradicts the common understanding of the time: that tribal ownership was a critical component of reservation status. . . .
>
> Rather than read the saving clause in a manner that eviscerates the agreement in which it appears, we give it a "sensible construction" that avoids this "absurd conclusion.". . .

Yankton I, 522 U.S. at 345, 346.

The sensible construction adopted by the Court in *Yankton I* reflects the traditional cession analysis set forth in *DeCoteau*.

B. The Cession Concessions Of The United States In *Yankton I* With Reference To Disestablished Reservation Boundaries Are Significant And Controlling Here.

In the process of advancing the Article XVIII savings clause argument, the United States conceded that but for the presence of Article XVIII, the 1894 Yankton act would have disestablished the 1858 Yankton reservation in the traditional sense recognized by this Court in *DeCoteau*. In oral argument, the United States, in response to direct questions from this Court, described that process in the following manner:

> QUESTION: Now this—this is a *totally* checker boarded situation?
>
> MS. MCDOWELL: That's correct, And this Court—. . . .
>
> MS. MCDOWELL: Well, the Court in DeCoteau, found total diminishment. But that was a different case, in several respects, from this one. In the first place, of course, there was no savings clause preserving rights under an earlier treaty. . . .

QUESTION: But do you—do you agree with both counsel, it seemed to me, that the choice is either we accept your argument based on Article XVIII or there's a diminishment?

MS. MCDOWELL: That's correct.

QUESTION: That there is no such thing as diminishment applicable on these facts?

MS. MCDOWELL: That's correct. Diminishment seems to be limited to cases such as Roseboud, where there was a selling or a ceding of a part of the reservation in so many words, as opposed to this sort of situation

Tr. Oral Argument, *Yankton I*, Cities App. 270a-271a. (emphasis added).

The totally checker boarded situation or "total diminishment" holding of the Court in *DeCoteau* (in the words of the United States), resulted from the extinguishment of the reservation boundaries by the act at issue there. *DeCoteau*, 420 U.S. at 427 n.2, 446-447. Also, as the United States further conceded in response to the last question from this Court, the Yankton cession was not a diminishment where there was only a "ceding of a *part* of the reservation" ("as *opposed* to this sort of situation"). *Id.* (emphasis added). The Yankton cession was a cession of *all* of the reservation that was not allotted. On these facts, diminishment in the sense of maintaining any portion of the 1858 reservation boundary was not possible, as the United States conceded.

For this reason, the entire 1858 reservation boundary was within the scope of the cession in *Yankton I*. In this respect, the rejection of the Article XVIII savings clause argument of the United States by this Court resulted in the extinguishment of the 1858 reservation boundary, "total diminishment" of the 1858 Yankton reservation. The United States clearly conceded the point.

C. This Court Has Made Clear That The 1858 Reservation Boundaries Of The Yankton Reservation Were Not Maintained.

> The 1894 Act is also readily *distinguishable* from surplus land Acts that the Court has interpreted as *maintaining reservation boundaries*. . . . The Tribe asserts that because that clause purported to conserve the provisions of the 1858 Treaty, the *existing reservation boundaries were maintained*. . . . [W]e *conclude* that the saving clause pertains to the *continuance* of annuities, *not the 1858 borders*.

Yankton I, 522 U.S. at 345-347 (emphasis added).

The Cities do not disagree with the argument in the Petition that the manner in which this Court in *Yankton I* treated the operative cession language should be controlling in resolving this case. In fact, as a practical matter, a fair reading of *Yankton I* and other precedent of this Court almost mandates this conclusion.

In order to simplify the issue, however, the Cities have approached the question of reservation disestablishment in this *amici curiae* brief from a different perspective, although the end result is still the same. *We have focused directly on this Court's discussion of the 1858 reservation boundaries.* The Cities specifically address the shifting position of the United States with reference to that discussion and to the holding of the district court *reinstating* the 1858 reservation boundaries. All of this clearly establishes that the decisions of the district court and the Eighth Circuit Court of Appeals are both erroneous.

1. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998)

(a) As a preliminary matter, it is logical to focus on the 1858 reservation boundaries because that is the manner in which cession precedent has been traditionally understood. In other words, if a cession removed lands from a reservation, it did so by extinguishing the reservation boundaries around

the area affected. *For decades, every court in every case, every federal Indian law text, every historian and every commentator that reviewed this precedent have agreed on this fundamental point.*

In this case, the United States can not cite a single example to the contrary. On the other hand, references to support this understanding are commonplace. As early as 1975, even the title of a note in the North Dakota Law Review reflected this understanding; INDIANS-RESERVATIONS-JURISDICTIONAL EFFECT OF SURPLUS LAND STATUTE UPON *TRADITIONAL BOUNDARIES* OF AN INDIAN RESERVATION. James M. Bekken, Comment, *Indians—Reservations—Jurisdictional Effect of Surplus Land Statute Upon Traditional Boundaries of an Indian Reservation*, 52 N.D. L. Rev. 411, 417 (1975) (emphasis added).

In the text of the note, the analysis is directed to the effect of surplus land statutes on reservation boundaries. For example, in the discussion of *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (the cession this Court in *Yankton I*, 522 U.S. at 344, described as "parallel" to the Yankton Act) the law student structured the statement of the issue in boundary terms:

> *DeCoteau* has clearly shown that to determine the effect a particular statute had on reservation *boundaries* the court must. . . .

Bekken, *supra* at 418 (emphasis added).

This concentration on the extinguishment of reservation boundaries is also routinely acknowledged even by tribal advocates who disagree with reservation disestablishment. For example, see the "boundaries" discussion throughout Susan D. Campbell, *Reservations: The Surplus Lands Acts and the Question of Reservation Disestablishment*, 12 Am. Ind. L. Rev. 57, 58, 63, 64, 71, 75, 96 (1984).

(b) With the extinguishment of reservation boundaries, it has also followed, *a fortiori*, that the Indian country

remaining in the affected area, if any, would be either dependent Indian communities under 18 U.S.C. § 1151(b) or Indian trust allotments under 18 U.S.C. § 1151(c). *Every court in every case, every federal Indian law text, every historian and every commentator are also in agreement in this instance.*[2]

In 1914, this Court made this point clear in *United States v. Pelican*, 232 U.S. 442 (1914) with respect to Indian trust allotments. In this situation, allotments subsequently held in fee (the primary issue here) are no longer "Indian country." *Pelican* was codified in 18 U.S.C. § 1151(c).[3]

Moreover, a recognition that this Court expressly held that the 1858 reservation boundaries were extinguished by this cession for a sum certain is not in any way inconsistent with the fact that the Court specifically reserved the question of whether the reservation was disestablished altogether. *Yankton I*, 522 U.S. at 358. That entirely distinct issue must still be decided in this case.

For these reasons, the Cities respectfully submit that this Court intended that the subject of the remand would be limited to the "reservation status" of only existing trust allotments, dependent Indian communities, and other trust lands. When reservation boundaries are extinguished, this would ordinarily be the case. See the reference in *Yankton I* to "conflicting understandings about the status of the reservation" and the "fact that the tribe continues to own land

---

[2] In the court of appeals, even the United States, in the alternative, finally acknowledged the legitimacy of this analysis. Br. of Plaintiff-Intervenor/Appellee United States of America at 26 n. 3, *Yankton II*, 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900).

[3] This Court recently reaffirmed and explained the analysis and codification of *Pelican* in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 528-529 (1998). *See also DeCoteau*, 420 U.S. at 427 n.2, 446-447, *Rosebud*, 430 U.S. at 586, 601 n.24, 613-615 n.47, 615-616 n.48.

in common." *Yankton I*, 522 U.S. at 358. These contentions do not directly implicate the status of fee lands, which are predominantly owned and populated by non-members. *See Yankton I*, 522 U.S. at 356-357.

In other words, *Yankton I* clearly resolved the status of the 1858 reservation boundaries. *See Yankton I*, 522 U.S. at 333, 343, 345, 345-346, 347, and 353.

Because of the law of the case, the 1858 boundary issue should not have even been addressed in this remand.

All else aside, this Court made clear in *Yankton I* that the 1858 "reservation boundaries" were *not* "retained" or "maintained"—"we *conclude. . . continuance* of annuities, *not the 1858 borders*." *Id.* at 347 (emphasis added). At the very least, the Court decided that question. The Court stated that the "case" presented the question of whether "Congress *diminished the boundaries*" of the Yankton Sioux Reservation. *Id.* at 333 (emphasis added). The unresolved issue, as the Court also clearly stated, was "whether Congress disestablished the reservation altogether." *Id.* at 358. That issue should not have involved resurrecting the status of 1858 reservation boundaries.

2. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (D.S.D. 1998) *rev'd* 188 F.3d 1010 (8th Cir. 1999) *petition for cert. filed* (U.S. Mar. 7, 2000) (No. 99-1490).

The district court ignored all of the above and simply held that even after Yankton I, the 1858 reservation boundaries were still intact. Yankton II, 14 F.Supp.2d at 1143. ("If the original exterior boundaries remain, as it appears they do from the Supreme Court's opinion"). *See also Yankton II*, No. 98-4042 (D.S.D. Oct. 5, 1998) (order denying motion for new trial at 3) ("The Court has now held that the remaining lands *within the 1858 boundaries* remain a part of the Yankton Sioux Reservation"). The district court was clearly mistaken (for the second time).

The strength of that conclusion is further supported by an express concession of the United States in the remand in June, 1998. At that time, the *United States conceded, in the district court, that this Court in Yankton I recognized that Congress did not intend to maintain the 1858 reservation boundaries:*

> [T]he United States Supreme Court found the savings clause *insufficient to maintain the reservation boundaries of the 1858 Treaty* here, and thus did not prevent diminishment of the Reservation. . . .

Summ. J. Br. for the United States at 22 n. 5, *Yankton II*, 14 F.Supp.2d 1135 (D.S.D. 1998) (No. 98-4042) (emphasis added). *See also* Summ. J. Br. for the United States at 2, 5, 6. Nevertheless, the United States made other arguments in support of the position of the Yankton Sioux Tribe.

After the district court recognized the 1858 reservation boundaries in *Yankton II*, the United States never again mentioned this extinguished boundary concession or the manner in which the holding of the district court conflicted with the express language of this Court in *Yankton I*.

3. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999) *petition for cert. filed* (U.S. Mar. 7, 2000) (No. 99-1490).

(a) In their brief to the court of appeals, the United States avoided any discussion of the express conflict between the holding of the district court and the conclusion of this Court in *Yankton I* regarding the 1858 reservation boundaries. As a result, the brief for the United States did not affirmatively support the tribal claim that the district court was correct in concluding that the 1858 reservation boundaries still exist.

The only reference that even indirectly addresses this aspect of the 1858 boundaries issue appears in the conclusion of the brief of the United States. The United States concluded:

> The Yankton Sioux Reservation continues to exist in *diminished form*, encompassing the unceded lands under

> the 1894 Act. The language of the 1894 Act, the legislative and negotiation history, and other surrounding circumstances *support diminishment*. . . .

Br. of Plaintiff-Intervenor/Appellee United States of America at 52, *Yankton II*, 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900) (emphasis added).

The United States never explained how the Yankton reservation could exist in this "diminished form" nor exactly what the United States meant by "diminishment" (except, of course, to claim the "diminished form" *encompasses all unceded land*). However, one thing is perfectly clear. This "diminished form" argument conflicts with *everything* the United States told this Court in *Yankton I*. *See* the "total diminishment" discussion *supra*.

According to the United States in *Yankton I*, nothing in the Yankton documentation supported diminishment in any form whatsoever. For example, in the court of appeals in *Yankton I*, the views of the United States mirrored those of the Yankton Sioux Tribe with respect to the *lack of any evidence to support changed, altered, or diminished reservation boundaries*:

> The 1892 Agreement, the ratifying Act, and other legislative and historical evidence do *not* indicate an intent by Congress to diminish or disestablish the Reservation.

Br. for United States as *Amicus Curiae* in Supp. of Plaintiffs-Appellees at 3, *Yankton I*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647) (emphasis added). *See also id.* at 4, 5, 8-15.

Significantly, in this Court in *Yankton I*, the United States, as *amicus curiae*, again agreed with this aspect of the historical record:

> But there was *no discussion* of whether the Agreement, if ratified, would alter the boundaries of the Reservation.
>
> *Solicitor Cohen notes . . . Since the 1892 agreement there has been no redefinition by Congress of the Yankton Reservation* . . . .

Br. for the United States as *Amicus Curiae* Supporting Resp'ts at 5, 25, *Yankton I*, 522 U.S. 329 (1998) (No. 96-1581), 206a, 226a, (emphasis added). Cities App.

The court of appeals viewed the argument to recognize the Yankton reservation in the form resurrected by the district court in light of all of the above. In addition to the opinion of this Court, all *Yankton I* briefs and related documents were made part of the record in *Yankton II*. Moreover, in oral argument members of the panel in the court of appeals in *Yankton II* expressly referenced the transcript of oral argument in this Court in *Yankton I* directed to the scope of the cession.

In this instance, the United States could not convince the court of appeals to affirm the holding of the district court. *Instead, the court of appeals expressly confirmed that the 1858 reservation boundaries were extinguished by the 1894 Yankton act. See Yankton II*, 188 F.3d at 1020-1021, 1030.

This part of the conclusion of the court of appeals is clearly correct. For this reason, nevertheless, the United States will probably attempt to skirt this issue again and not directly address the status of the 1858 reservation boundaries. If the United States repeats the argument in this Court in support of the holding of the district court, its submission will not contain any direct reference to the status of the 1858 reservation boundaries. Instead, the United States will advance some other argument that otherwise generally supports the holding of the district court. The failure of the United States to specifically address the status of the 1858 reservation boundaries undermines the position of the United States.

(b) In other respects, the holding of the court of appeals is fundamentally flawed. With specific reference to the diminished reservation, the holding of the court of appeals is suspect for several reasons. First, as even the Yankton Sioux Tribe noted in its application for a stay, the court of appeals

has adopted a "third" option. Mot. for Stay Pending Pet. for Writ of Cert., *Yankton II*, 188 F.3d 1010 (8th Cir. 1999) (No. 98-3893, 3894, 3896, 3900). Importantly, no one, including the United States, argued that this third option was supported by anything in the *Yankton* documentation. Moreover, no one even suggested that the third option was a possibility in the district court or the court of appeals. As a result, the third option issue was not briefed or argued in either the district court or the court of appeals.

Importantly, the Yankton Sioux Tribe agrees with Petitioners that the "third option" holding of the court of appeals appears to be "inconsistent with all prior Supreme Court cases." *Id.* at 1-2.

> The parties to this appeal argued in their petitions for rehearing that prior Supreme court cases allowed for two possible resolutions to the captioned appeal [1858 reservation boundaries in tact or extinguished]. The circuit decision creates a third option, which appears to be *inconsistent with all prior Supreme court cases*. Whether the Supreme Court will approve this third option is *clearly a substantial issue*.

Id. at 1-2 (emphasis added).

Although the Cities disagree with the Tribe on the reason for the inconsistency, whether this Court eventually agrees with the Tribe (1858 reservation boundaries intact) or with the Petitioners, State of South Dakota, Charles Mix County, and Southern Missouri Waste Management District (1858 reservation boundaries extinguished) is really beside the point at this stage in the proceedings. The important fact is that the parties agree that the "third option" holding of the court of appeals is inconsistent with precedent from this Court; the parties further agree that this inconsistency presents this Court with a substantial question.

Moreover, the "diminished form" of the Yankton reservation now recognized by the court of appeals in *Yankton II*, also conflicts with the testimony of both of the

expert witnesses for the United States in district court in *Yankton II* (these were the *only* witnesses to testify). And the recently adopted litigation position of the United States that boldly asserts that the Yankton legislation is truly "unique" adds nothing to the credibility of this position. Br. of Pl.-Intervenor/Appellee United States of America at 10, *Yankton II*, 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900). The Yankton documentation also squarely refutes this notion. See the discussion in the Southern Missouri Waste Management District brief under subheading I-A, "A SUMMARY OVERVIEW ESTABLISHES THAT THE CONGRESSIONAL PROCESS FOR THE YANKTON ACT FOLLOWED A STANDARD OPERATING PROCEDURE" at 7-12, Br. for Southern Missouri Waste Management Dist. at 7-12, *Yankton II*, 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900).

D. The Fact That The United States Has Decided Not To File A Petition Is Important.

This is a significant concession. In light of the nature of the advocacy set forth *supra*, this concession further supports the Petition for a Writ of Certiorari filed by the State of South Dakota, Charles Mix County and Southern Missouri Waste Management District.

CONCLUSION

For the foregoing reasons, and those stated in the Petition of the State of South Dakota, Charles Mix County and Southern Missouri Waste Management District, that Petition for Writ of Certiorari should be granted.

Respectfully submitted,

TIMOTHY R. WHALEN
Counsel of Record
WHALEN LAW OFFICE, P.C.
P. O. Box 127
Lake Andes, SD 57356
(605) 487-7645

Dated May 8, 2000

APPENDIX TABLE OF CONTENTS

	Page
Brief of Charles Mix County, South Dakota, *Amicus Curiae*, in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581)	1a
Memorandum for the United States, *Seymour v. Superintendent*, 368 U.S. 351 (1962) (No. 8 Misc.)	34a
Brief for the United States as *Amicus* Curiae, *Mattz v. Arnett*, 412 U.S. 481 (1973) (71-1182)	37a
Brief for the United States as *Amicus Curiae, DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148)	60a
Brief for the United States as *Amicus Curiae, Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562)	88a
Brief for the United States as *Amicus Curiae* Supporting Respondent, *Solem v. Bartlett*, 465 U.S. 463 (1984) (No. 82-1253)	131a
Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Hagen v. Utah*, 510 U.S. 399 (1994) (No.92-6281)	161a
Brief for the United States in Opposition, *Yankton Sioux Tribe v. State of South Dakota*, 796 F. 2d 241 (8th Cir. 1986)., (No. 86-1436) cert. Denied	190a
Brief for the United States as *Amicus Curiae* Supporting Respondents, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581)	202a
Transcript of Oral Argument at 13-21, *Mattz v. Arnett*, 412 U.S. 481 (1973) (No. 71-1182)	233a

APPENDIX TABLE OF CONTENTS—Continued

Page

Transcript of Oral Argument at 9-24, *Erickson v. Feather decided with DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148) 239a

Transcript of Oral Argument at 18-30, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) 250a

Transcript of Oral Argument at 18-27, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 259a

Transcript of Oral Argument at 43-52, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581)..... 266a

APPENDIX

No. 96-1581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF SOUTH DAKOTA,

v. *Petitioner,*

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

and *Respondents,*

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF CHARLES MIX COUNTY, SOUTH DAKOTA, *AMICUS CURIAE,* IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

INTEREST OF *AMICUS CURIAE*

The vital concern that prompts the filing of this *Amicus* Brief can be simply stated. Prior to this litigation, all the courts and parties had recognized that the 1858 Yankton reservation no longer existed. Now, a century later, more than half of the area of Charles Mix County, South Dakota, is at issue. Consequently, the approximately 6,000 people that reside there presently face the prospect of being suddenly thrust into the status of residents of an Indian reservation. If this takes place, their officials would have only limited jurisdiction and the non-members would have no elected voice in the governance of their affairs and property by the Yankton Sioux Tribe.

The demographics of Charles Mix County in this area are similar to other non-reservation rural counties found in the State of South Dakota and the United States. This is a county that has a significant rural farm population. In terms of agricultural productivity, the land consistently produces above average yields on a state-wide basis. Approximately ninety-eight percent (98%) of the acres in Charles Mix County are classified as farm land. This farm land has an above average valuation and an above average assessed dollars per acre worth. *Ninety* percent of the land is owned by non-members and over *two-thirds* of the residents are non-members who reside on these small farms and in small towns and cities like Dante, Lake Andes, Pickstown, Ravinia and Wagner. *See* Brief for the Cities as *Amici Curiae*. In all, there are forty-nine (49) political subdivisions within the county.

Although this Court has repeatedly recognized in this situation, that the justifiable expectations of the people should not be lightly regarded or simply swept aside, the panel majority ignored that prudential advice. *Hagen v. Utah*, 510 U.S. 399, 421 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977). For these reasons, the issue here is of grave importance to the residents and governments of Charles Mix County, South Dakota.

By contrast, here, as in *Hagen*, it is also important to restate what is not at issue. *Hagen*, 510 U.S. at 421. The Indian trust lands and the seat of the Yankton Sioux tribal government situated on Indian trust lands ("tribal headquarters area at Marty") are not at issue. *State v. Greger*, 559 N.W.2d 854, 859 n.4 (S.D. 1997), Pet. App. at 135. *See also* Cities Pet. Brief at 7 n.1 (Marty).

The Supreme Court of the State of South Dakota subsequently considered the identical disestablishment question in *State v. Greger*, Pet. App. at 125. In a unanimous opinion, the State Supreme Court rejected the views of the panel majority and reaffirmed the longstanding position that the Yankton reservation was disestablished. The County would submit that the views of the State Supreme Court are more in line with the principles formulated by this Court, principles that should have been controlling here.

Importantly, this is only the second time that any federal court of appeals has ever held that a congressional act of this nature did not disestablish the reservation area affected; the first and only other case with a similar holding was promptly reversed in *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

SUMMARY OF ARGUMENT

The County fully supports the arguments set forth in the Brief of the State of South Dakota. The County further agrees that the decision of the panel majority conflicts substantially with the relevant decisions of this Court. This brief will focus on that conflict and the role of the United States in the entire process.

A fair reading of *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Solem v. Bartlett*, 465 U.S. 463 (1984) and *Hagen v.*

Utah, 510 U.S. 399 (1994), clearly undermines the views set forth by the panel majority. The State highlights these important principles and, for that reason, they will not be repeated here.

In addition, however, a proper perspective regarding the history of disestablishment litigation before this Court is important in order to accurately assess the views of the panel majority and the dissent in conjunction with the principles set forth in these decisions. This brief is intended to serve that purpose and provide that perspective. The County starts with a brief review of the primary arguments presented and rejected in each case decided by this Court, as well as the historic perspective available or established at the time.[1] Such a review advances three overriding themes.

First, as one would expect, each time the Court was presented with this issue, more primary sources were available from which a proper historical perspective could be reconstructed and the intent of Congress more conclusively ascertained. The opinions reflect this documentation.

Second, the views of the United States are especially noteworthy. The United States rarely fails to advocate the resurrection of original reservation boundaries, presumably because of a perceived obligation to support the tribal position. The shifting, but very sophisticated, arguments of the United States (for the most part repeatedly rejected by this Court) have mainly served to perpetuate

---

[1] This brief does not address the decision of this Court in *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753 (1985) in detail, only because it is not truly a disestablishment case. However, *Oregon* does involve a cession agreement and the *Oregon* opinion sheds considerable light on understanding the cession process. The Supreme Court of South Dakota in *Greger* cited and discussed *Oregon* in several instances. Pet. App. at 140 n.6, 149, 150. For all of these reasons, *Oregon* is important and merits consideration in this case.

the confusion and conflicts in this area of federal Indian law, fueling the prospect of additional litigation.

The central arguments of the United States are therefore closely examined for another reason. As will be seen, the United States repeatedly has made a number of important *concessions* in this Court, subsequent to *DeCoteau*, regarding the *effect of cession agreements*, like this one, on Indian reservations. These cession concessions, made in conjunction with submissions that urged the continued recognition of other original reservation boundaires, cannot be explained away. The views of the United States in this regard, submitted to this Court, merit continued consideration.

This brief also addresses, in chronological order, the specific concessions of the United States regarding the disestablishment of the 1858 Yankton Sioux reservation effected by the passage of the 1894 Yankton Sioux cession act. *Infra* at 5. In 1984, the United States formally submitted this Yankton disestablishment concession in the Eighth Circuit Court of Appeals. *United States v. Dion*, 752 F.2d 1261 (1985); *United States v. Dion*, 476 U.S. 734 (1986). The United States did so in order to maintain a cession distinction in *Solem* essential to its argument there supporting original reservation boundaries. Moreover, in other litigation also pending at the same time, and also involving the 1858 Yankton Sioux reservation and the 1894 Yankton Sioux cession act, the United States acknowledged that this Court's decision in *DeCoteau* considered "a similar and contemporaneous cession agreement" with "the same language" and "purpose." BUS, Co. Pet. App. at 166a. Significantly, Article XVIII of the 1858 treaty that the United States has now insisted is so important, was not mentioned in any of this.

ARGUMENT

A. A Review of the Arguments Previously Presented and Rejected in This Court Establishes Clear Principles That Undermine the Opinion of the Panel Majority.

> Now, this principle that Congress did not intend to disestablish the Reservations is not one that the government has made up out of *whole cloth*. It is supported both by history and by the previous decisions of this Court.

Office of Solicitor General, Tr. at 22, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) (emphasis added).

1. *Seymour v. Superintendent*, 368 U.S. 351 (1962). A disestablishment issue was first presented to this Court in *Seymour*. Although we now know that the 1906 Colville Act at issue in that case was one in a series of surplus land statutes enacted pursuant to the General Allotment Act of 1887 (Dawes Act)—a routine matter for Congress by 1906—neither the General Allotment Act of 1887 nor the limited legislative history of the 1906 Act played any real role in the resolution of the question. Act of February 8, 1887, 24 Stat. 388. The *Seymour* opinion does not cite the General Allotment Act or the legislative history of the 1906 Colville Act. The briefs are similarly silent with respect to the General Allotment Act and the few citations to the 1906 legislative history are set forth almost as an afterthought.

In short, *Seymour* was decided *almost* without the benefit of any historical perspective. "Almost" is used because, although neither the General Allotment Act nor the legislative history of the specific act in question played any role in the decision, Petitioner Seymour did rely on the contrast between the 1906 Act and the earlier 1892 "public domain" legislation that concededly disestablished the North Half of the Colville Reservation. Pet. Br. at 10, *Seymour* (No. 62). At best, this was a limited perspective, but certainly one that benefited Petitioner by simple

contrast. More important matters were not briefed, i.e. the argument that the public domain format of the 1892 Act was the result of a refusal by Congress to ratify a previously negotiated 1891 cession agreement due to the questionable nature of the title to the Colville Executive Order Reservation and the argument that the language was added to deal with a congressional concern that undesirable precedent might be established. *Antoine v. Washington,* 420 U.S. 194, 216 (1975) (Rehnquist, J., dissenting); S. Rep. No. 664, 52d Cong., 1st Sess. (1892). *See also U.S. v. Pelican,* 232 U.S. 442 (1914). In any event, it is doubtful whether any of the above would have altered the views of the United States, which argued in support of the reservation boundaries of the South Half of the Colville Reservation ("Solicitor General has urged this construction upon the Court"). *Seymour,* 368 U.S. at 357.

The Solicitor General's three page argument was based predominantly on the 1948 statutory definition of Indian country which, of course, begs the question. It was also based upon *subsequent* congressional recognition, primarily in 1956, that the reservation continued to exist. BUS, Co. Pet. App. at 3a. Neither the General Allotment Act nor the historical perspective of the 1906 Act played any role in the brief for the United States. In this light, *Seymour* concluded, without further citation, that:

> The Act did no more than *open the way for non-Indian settlers* to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.

Seymour, 368 U.S. at 356 (emphasis added).

The United States later seized on this statement from *Seymour* and tied it to the General Allotment Act of 1887 (which, as previously noted, was not even mentioned in *Seymour*). In effect, the United States attempted to attribute to both *Seymour* and the General Allotment Act,

a new congressional plan or purpose consistent with a new argument that no surplus land statute, passed pursuant to the General Allotment Act of 1887, was ever intended by Congress to disestablish portions of Indian Reservations—a "whole cloth" argument: the revisionist theory of the General Allotment Act.[2]

The United States focused on the General Allotment Act of 1887 for more than one reason. Prior to that time, Congress routinely utilized treaties, cession agreements and other similar arrangements, some of which contained allotment provisions, to disestablish reservations and open territories throughout the United States to settlement for decades:

> [t]he policy of the Government from its earliest days has been to restore Indian reservations or portions thereof to the public domain as the exigencies of advancing population required it. . . .

H.R. Rep. No. 791, 50th Cong., 1st Sess. at 3 (1888). No one had ever attempted to even formulate an argument that Congress never intended these actions to disestablish the limits or boundaries of Indian reservations. If similar cession agreements, passed subsequent to 1887, were not intended to have the same effect, the General Allotment Act of 1887 was the only point in history that Congress could have even arguably intended to have altered such a fundamental historical process. This is especially so in the absence of some affirmative evidence that Congress specifically intended to depart from that historical format, either generally or in a certain case. (The United States could not produce such evidence at the time—or, as a matter of fact, ever. And it will not do so in this case.) The first opportunity for the United States to advance the new revisionist theory of the General Allotment Act argument in this Court came in *Mattz v. Arnett, supra.* BUS, Co. Pet. App. at 14a-15a.

---

[2] *See* the "whole cloth" disclaimer noted *supra* at 5.

2. *Mattz v. Arnett*, 412 U.S. 481 (1973). Although the United States argued forcefully for the broad sweep of *Seymour* tied to the General Allotment Act, this argument met with only limited success in *Mattz*. BUS, Co. Pet. App. at 12a-14a. The history of the Klamath River Reservation at issue in *Mattz* was so tortious and fact specific, isolated and atypical, that the *Mattz* dicta regarding the General Allotment Act, while all that the United States could have hoped for, did not really seem pivotal to the decision.

Certainly, the United States repeatedly told the *Mattz* Court:

> The Act of 1892 can properly be understood only in light of the *General Allotment Act* which Congress had recently passed.
>
> In our view, the Act of June 17, 1892, can properly be understood only in light of two considerations: (1) what Congress had done five years earlier in the *General Allotment Act*. . . .
>
> *The policy of the Act* was to continue the reservation system and the trust status of Indian land. . . .
>
> This Court's more recent decision in *Seymour v. Superintendent*, 368 U.S. 351, is, in our view, controlling here. . . .

BUS, Co. Pet. App. at 10a, 14a, 24a (emphasis added). *See also, id.* at 11a, 15a n.8.

And at oral argument, the United States squarely placed this issue "into a little bit of historical perspective":

> This same policy is recognized more recently by this Court in *Seymour v. Superintendent*. . . .

Tr. at 19-20, *Mattz* (No. 71-1182). *See also, id.* at 13, 14, 15, 21.

At the same time, to shore up this new General Allotment Act argument and supplement this "little bit" of historical perspective for the Court, the United States also discussed certain statutes that concededly disestablished

Indian reservations. According to the United States, the Court could, by contrast, look to these examples in determining when congressional action was really intended to disestablish an Indian reservation—an instant historical perspective. BUS, Co. Pet. App. at 18a-19a. Following Petitioner's lead in *Seymour*, and especially in light of this aspect of the *Seymour* opinion, the controlling example cited by the United States of a congressional mandated disestablishment was the 1892 *Colville* statute, where the operative language restored the north half of the reservation to the public domain. As the United States told this Court in *Mattz*, among other things:

> This Court's more recent decision in *Seymour v. Superintendent*, 368 U.S. 351, is, in our view, *controlling* here. . . . In holding that the Act did not terminate the reservation there at issue, the Court emphasized the absence from the Act of language abolishing the reservations or "restoring that land to the public domain" (368 U.S. at 355).

BUS, Co. Pet. App. at 24a (emphasis added).

Other examples were also listed by the United States to support this "by contrast" argument, including a typical cession. *Id.* at 18a-19a (the *cession* example merits special attention *infra*).

At oral argument, the United States repeated the "by contrast" point:

> MR. SACHSE . . . In closing, since I assume I am out of time, I refer the Court to page 17 of our brief where we have samples of language that Congress used when it did want to discontinue a portion of a reservation.

Tr. at 20-21, *Mattz* (No. 71-1182).

(Except for the cession example, the text *infra* establishes that the others on the list were representative of atypical situations encountered by Congress only on rare occasions and decades apart.)

Without question, the *Mattz* opinion reflects both arguments made by the United States. First, with respect to the General Allotment Act:

> Its policy was to continue the reservation system and the trust status of Indian lands, ... See § 6 of the General Allotment Act, 24 Stat. 390; United States Department of the Interior, Federal Indian Law 115-117, 127-129, 776-777 (1958). . . .
>
> . . . This Court unanimously observed in an analogous setting in *Seymour, id.*, at 356, . . .

Mattz, 412 U.S. at 496, 497.

Secondly, with respect to the "by contrast" argument, the Court in *Mattz* noted:

> More significantly, throughout the period from 1871-1892 numerous bills were introduced which *expressly* provided for the termination of the reservation and did so in unequivocal terms. . . .
>
> Congress has used clear language of express termination when that result is desired. See, for example. . . .

Id. at 504, n.22 (emphasis added).

Two years later, this Court was actually presented with a typical surplus land statute specifically patterned and enacted pursuant to the terms of the General Allotment Act. With the supporting documentation of both the specific act as well as the General Allotment Act, the General Allotment Act *dicta* in *Mattz* did not dissuade the Court, including the author of the *Mattz* opinion, from correctly concluding that surplus land statutes passed pursuant to the General Allotment Act were also intended and routinely passed by Congress to disestablish Indian reservations. *DeCoteau v. District County Court*, 420 U.S. 425, 447-449 (1975). Predictably, the United States again argued forcefully for a different result in *DeCoteau*.

3. *DeCoteau v. District County Court*, 420 U.S. 425 (1975). In *DeCoteau*, the surplus land statute at issue was one of eight similar agreements in a cession format

jointly ratified in an 1891 Appropriation Act. Each of these agreements was specifically tailored to the provisions in the General Allotment Act, which had recently been passed after nearly a decade of focused debate. For these two reasons, fortuitous in retrospect, the historical record consisted of hundreds of pages directed to this aspect of the General Allotment Act (Section 5) and the effect the cession agreements were understood and intended to have.

Moreover, for the first time, all of this primary documentation was excerpted and presented to the *DeCoteau* Court in several hundred pages of briefs, setting forth a complete and proper historical perspective. That perspective established that although simple allotment per se (Section 6 of the General Allotment Act) was only intended to disestablish reservations at *some* point in the foreseeable future, a separate and distinct surplus land statute, in a cession format, opening the reservation or a portion thereof to settlement pursuant to Sec. 5 of the General Allotment Act, was intended to disestablish the affected reservation *pro tanto* (on the date of the opening set forth in the Presidential Proclamation). This was in precisely the same manner that pre-1887 cessions had disestablished reservations for decades, when Congress and/or the President authorized similar legislation.

The United States elected to ignore the force of this documentation, and instead urged the *DeCoteau* Court to recognize the continuing existence of the original reservation boundaries on the basis of *Seymour* and *Mattz* and the United States' revisionist theory of the General Allotment Act. While agreeing that the focal point of the issue had to be the General Allotment Act of 1887, the United States pressed the point that *Seymour* and *Mattz* were both openings pursuant to that act, and that no act pursuant to the General Allotment Act was ever intended to effect reservation disestablishment except at some future point in time. (Again, as in the Brief for the United States in *Mattz*, the United States blurred the distinction

between allotment per se (Section 6 of the General Allotment Act) which eventually resulted in some non-Indian ownership within the limits of Indian reservations, but was never intended to immediately disestablish the reservations, and surplus land statutes enacted pursuant to Sec. 5 of the General Allotment Act, which repeatedly accomplished this result). BUS, Co. Pet. App. at 37a, 38a, 39a, 40a.[3]

In addition, the United States submitted a series of very sophisticated arguments drawn from little scraps of language found in *Seymour* and *Mattz* to support this general proposition. No degree of sophistication, however, could overcome the problem the United States never addressed: namely, the fact that all of the contemporary historical evidence irrefutably pointed to the opposite conclusion. *DeCoteau*, 420 U.S. at 432, 434, 436, 438 and 441.

Further, the cession format utilized by Congress in previous decades—with the end result never questioned in terms of reservation boundaries—was only slightly modified at this point in time (1887 through the early 1900's). As a result, the United States could only argue that the cession format itself was probative of nothing because it was not within the list of self-serving "by contrast" examples the United States *now* said Congress utilized when Congress "clearly" intended to effectuate this result (the list noted previously was compiled by the United States and noted in *Mattz*, 412 U.S. at 497, n.19). In the original version of the list presented to the Court in *Mattz*, the United States had included representative cession language. BUS, Co. Pet. App. at 18a-19a. When that cession example did not appear in the *Mattz* opinion, the United States omitted any mention of this fact to the Court, simply adopted the *Mattz* list and argued throughout *DeCoteau* that the cession language was meaningless. *Id.* at 40a-41a.[4]

---

[3] *See also*, Tr. at 11, 13, 17, 21, *Erickson v. U.S ex rel. Feather*, (No. 73-1500), *decided with DeCoteau.*

[4] At the time, the State of South Dakota evidently overlooked this aspect of the original list and the fact that the typical cession

Even without a specific historical point of reference, it is difficult to believe that the *DeCoteau* Court would have found this argument credible when actually presented with a real cession agreement. When all of the *DeCoteau* documents conclusively established that the *DeCoteau* cession format was still the rule at this point in time *i.e.*, *after* the General Allotment Act, rather than the exception, this argument was soundly rejected. Cession terminology was "precisely suited" to disestablishment and the remainder of the sophisticated arguments of the United States were noted and rejected for that reason. *DeCoteau*, 420 U.S. at 445.[5]

---

example submitted by the United States in the Brief for the United States in *Mattz* (as "direct and unambiguous language" of disestablishment) was actually ratified in the same statute as the cession agreement presented in *DeCoteau*. BUS Co. Pet. App at 40a. To the extent that the United States was making the opposite argument in *DeCoteau*, this oversight was fortuitous for the United States in that this contradictory position was never brought to the Court's attention.

[5] As the Court in *DeCoteau* noted, as recently as 1963, the United States had joined with South Dakota in the argument that cessions disestablished reservations. Joint Brief of Respondent State of South Dakota and United States as *Amicus Curiae* at 7, *DeMarrias v. State*, 319 F.2d 845 (8th Cir. 1963) (No 17200). *DeCoteau*, 420 U.S. at 443.

Not surprisingly, in every way that is arguably significant, the Yankton documents mirror and reflect the same terminology, discussions, considerations, policies, and generalities presented in *DeCoteau*. In fact, as Respondent Southern Missouri Waste Management District pointed out, the Yankton Commissioners repeatedly referred specifically to the terms of the Sisseton Agreement. Br. of Resp't District at 18-19. *See also* South Dakota Representative Pickler's remarks in the Congressional Record ("same kind of a treaty we have always made" . . . "procure these lands in the same way" . . "we make no departure from our past policy" "just as all other cessions of land" . .). *Id.* at 36-37. As a result, in both instances the Commissioner of Indian Affairs and the Secretary of the Interior also acknowledged that both reservations were "restored to the public domain." *Id.* at 9. *See generally Hagen* 510 U.S at 412-414 (public domain)

4. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The United States subsequently resisted the force of *DeCoteau*. In 1977, in *Rosebud*, this Court considered three Sec. 5 surplus land statutes considered by Congress a decade after the *DeCoteau* surplus land statutes were passed. The United States again argued that, after adopting the General Allotment Act, Congress never intended this type of statute to disestablish portions of Indian reservations. As in the past, reliance for this argument was placed almost entirely upon *Seymour* and *Mattz*. In its brief, the United States specially emphasized that *Mattz* noted:

> Placing the 1892 Act into the historic context of *the General Allotment Act of 1887*, 24 Stat. 388, the [*Mattz*] Court further observed that the Allotment Act "permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to *continue the reservation system*. . .

BUS, Co. Pet. App. at 65a (emphasis in original text).

In its discussion of *DeCoteau*, the United States failed to mention the role played by Sec. 5 of the General Allotment Act and the cessions in the *DeCoteau* process. *Id.* According to the United States, *DeCoteau* was important primarily because of the differences between the cession act there and the *Rosebud* legislation, i.e., the unilateral nature of the congressional action in *Rosebud* and the uncertain payment in trust for the *Rosebud* land.

At oral argument, the United States repeatedly stressed its revisionist theory of the General Allotment Act. The United States maintained that after this act, Congress never intended reservation disestablishment. *DeCoteau* was mentioned only in passing and then primarily to somehow support continued reservation boundaries throughout this period. Tr. at 20, 21, 27, 29, *Rosebud* (No. 75-562).

The *Rosebud* Court proceeded, in the most definitive opinion to date, to squarely address each and every argu-

ment—sophisticated arguments to be sure (and there were many)—advanced in support of the Court restoring the original boundaries of the Rosebud Reservation. Although one or two minor exceptions might exist, a careful reading of *Rosebud*, together with *DeCoteau* as recognized historical background, establishes that the United States, the Yankton Sioux Tribe and supporting *Amici*, can not advance any argument of substance that has not already been answered. (And, as in *DeCoteau*, the public domain concept, whether expressed on the face of the act or in the legislative history, was still important in *Rosebud* and equated with reservation disestablishment.)

Unquestionably, as time went on, the cession format of the earlier period was modified, but these changes in format reflect no change in congressional intent. Thus, it ultimately mattered little that the 1904 *Rosebud* Act was technically not a "cession." As the Court in *Rosebud* explained:

> As a matter of strict English usage, petitioner is undoubtedly correct; "cession" refers to a voluntary surrender of territory or jurisdiction, rather than a withdrawal of such jurisdiction by the authority of a superior sovereign. But as Mr. Justice (then Judge) Holmes commented, we are not free to say to Congress: "We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States*, 163 F. 30, 32 (CA1 1908). . . .
>
> The use of the word "cession" in the 1904 Act, which was not consented to by the required extraordinary majority of the Tribe, does not make the meaning of the Act ambiguous. . .
>
> The word is technically misused but the meaning is quite clear.

Rosebud, 430 U.S. at 597.

In the instant case, of course, the word "cession" is not technically misused. And the United States' comments

regarding real cessions in *Rosebud* (alternatively, in an attempt to distinguish *Decoteau*) bear repeating now:

> The court of appeals, however, failed to recognize the *crucial difference* that in *DeCoteau* the United States itself purchased the land in the reservation pursuant to an agreement with the Indians; this, the Court held, restored the land to the public domain and extinguished the reservation. 420 U.S. at 446-447.

Memorandum of the United States at 13, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) (emphasis added).

> The 1891 Act had ratified an agreement in which the Tribe expressly *ceded* to the United States all its "right, title and interest" in the land for a lump sum. The Court contrasted this transaction with the Acts involved in *Seymour* and *Mattz*. . . . The *differences* identified by the Court are *important* to the present case. The 1891 Act was a *negotiated agreement* with the Tribe, whereas the Acts involved in *Seymour* and *Mattz* were "unilateral" Acts of Congress not agreed to by the Tribes. . . .
>
> The 1891 Act was a *straightforward cession for a sum certain in amount*. . . . These *distinctions* led to the conclusion that the Lake Traverse Reservation was extinguished and the land restored to the public domain. . . .
>
> In *DeCoteau* (but not in *Seymour* or *Mattz*) the *United States itself purchased the land in the Reservation pursuant to an agreement with the Indians; this, the Court held, restored the land to the public domain and extinguished the Reservation.*

BUS, Co. Pet. App. at 66a, 67a (emphasis added).

The United States also reminded this Court of the 1934 Interior Department Opinion which they continued to rely upon for *traditional* confirmation that real *cessions disestablished reservations*:

> In this way the *exterior boundaries* of a reservation were further reduced. The lands thereby separated from a reservation were no longer looked upon as being part of that reservation.

54 Interior Dec. 560 (1934) (emphasis added) cited and quoted in part in Memo. of the United States at 19-21 *Rosebud* (No. 75-562) and BUS, Co. Pet. App. at 79a ("The Secretary noted that many reservation lands had been ceded for a sum certain and concluded that '[t]he lands thereby separated from a reservation were no longer looked upon as being a part of that reservation'" (54 I.D. at 560)). *Id.*

It is beyond dispute that both the Sisseton and the Yankton reservation agreements are within the purview of this analysis. For this reason, as the United States pointed out, the list in the 1934 Opinion included some 26 "reservations." It did not include *either* the Sisseton or Yankton cession. BUS, Co. Pet. App. at 80a.

In oral argument, the United States reiterated, by negative implication, this same dominant point:

> [W]henever Congress *without* a binding agreement opens lands to white settlers, it does *not* pay for them and does *not* guarantee any payment but only agrees to act as trustee for future uncertain sales and leaves the property interest in the Indians—as they did in this case—that act does *not* remove the lands from the boundaries of the Reservation.

Tr. at 22, *Rosebud* (No. 75-562) (emphasis added).

A few minutes later, the same cession distinction was stressed in a different context:

> [I]n *DeCoteau*, which distinguishes both cases in a case where sale was made for a sum certain and an agreement was made, as counsel for the Tribe has discussed. . . .

Id. at 28.[6]

---

[6] *See also* Rosebud Sioux Tribe's Brief in *Rosebud* that tracks this position and confirms that same understanding regarding the

5. *Solem v. Bartlett*, 465 U.S. 463 (1984). In *Solem*, the United States combined and restated so many variations of earlier arguments that even a summary review is difficult to present here. Moreover, since the United States did not participate in oral argument, that source is not available. In short, however, it can be fairly stated that the United States in *Solem* argued whatever was necessary to resist reservation disestablishment.

Most important for the present case are the concessions of the United States regarding cessions which were adopted in the Court's Opinion. *Solem*, 465 U.S. at 470, 473 n.15, 474, 476, 478. The State addresses these points. State's Br. at 9, 15-16, 26 n.15.

For example, the United States said:

> [*C*]*ritically different* from the situation in *DeCoteau* and *Rosebud* in at least the following respects: (1) the relevant legislation contains *no* language of "cession"; (2) there was *no* prior tribal agreement to cede the relevant area. . . .

Br. for the United States as *Amicus Curiae* Supp'ng Resp't (opposing Pet. for Cert.) at 4 n.3, *Solem* (No. 82-1253) (emphasis added).

On the merits, the cession theme was restated with unmistakable clarity:

> The *critical* question remains whether the statute invoked worked an immediate and irrevocable cession. . . .
>
> To be sure, as *DeCoteau* and *Rosebud* illustrate, there are instances in which a Reservation *must* be

---

traditional view that real cessions disestablished reservations. Tribe's Brief at 12, 13 and 16, *Rosebud* (No. 75-562). Counsel for the Rosebud Sioux Tribe has decades of experience in this area of the law. At oral argument, he unequivocally stated:

> A cession is a sale. It is a high-class sale. It is a sale between sovereigns. . . The Court assumed there was a cession. That is the fundamental error of the Court Below.

Transcript of Oral Argument at 12-13, *Rosebud*, 430 U.S. 584.

> found to have been irrevocably terminated or diminished. . . . In the climate of the times, the *only meaningful question* is whether the legislation meant to accomplish a *present, unequivocal* and *irrevocable* transfer of Reservation lands from the Tribe to the United States.
>
> The *critical* fact in all these cases is that Congress exacted a *present and total surrender of all tribal interest* in the ceded land in return for an *unconditional commitment* by the United States to an agreed payment. . . .
>
> [T]he clear line between *outright* cession and mere opening up of tribal lands was not always observed. . . . But we do not read *Rosebud* as erasing the *traditional distinction.*
>
> What is relevant, however, is that, at the end of the day, *no cession resulted.*

BUS, Co. Pet. App. at 103a, 109a, 110a, 111a, 113a, 122a (emphasis added).

In this light, it is not surprising that *Solem* repeatedly made these same cession observations.

6. *United States v. Dion,* 476 U.S. 734 (1986). In order to maintain the cession distinction essential to the argument in *Solem,* the United States had to make similar concessions in other cases then pending. As a result, at about the same time (1984), the United States recognized that cession disestablishment was the dominant factor in the history of the 1858 Yankton reservation and further, that the 1858 Yankton reservation had in fact been *disestablished* by the 1894 Yankton cession act at issue in the present case. Opening Brief for the Federal Appellant at 16, 17 n.10, *United States v. Dion,* 752 F.2d 1261 (8th Cir. 1985). This submission by the United States was made in the Eighth Circuit Court of Appeals sitting *en banc* in conjunction with the appeals of federal prosecutions of Yankton Sioux tribal members and others for unlawfully killing bald eagles, as the United States has acknowledged. Brief for the United States as *Amicus*

Curiae in Support of Plaintiffs-Appellees at 18 n.8, *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647).

In *Dion*, in the opening brief, the United States correctly identified the relationship between the 1858 Yankton cession treaty and the 1894 Yankton cession act under a subheading disputing a treaty "right to hunt eagles to extinction" (one Yankton Sioux tribal member had allegedly killed twenty bald eagles in the course of a year). Opening Brief for the Federal Appellant at 16, 17 n.10, *Dion*, 752 F.2d 1261; Transcript at 18, 27, *Dion*, 476 U.S. 734. In addition, and in accord with the cession disestablishment submission in *Solem v. Bartlett*, 465 U.S. 463 (1984), the United States specifically cited with approval the controlling federal and state decisions that recognized and held that the 1858 Yankton reservation was disestablished by the 1894 Yankton cession act:

> In 1858, the Yankton Sioux negotiated a treaty with the United States in which they "ceded and relinquished" to the United States all but 400,000 acres of the lands claimed by them. Treaty with the Yankton Sioux, Art. I, 11 Stat. 743. (April 19, 1858)[10] . . . .[10] In 1894, Congress ratified an agreement with the Yankton Sioux which further diminished the size of their reservation. Act of August 15, 1894, § 12, 28 Stat. 286, 314. See *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980); *State v. Williamson*, 211 N.W.2d 184 (S.D. 1973).

Opening Brief of the Federal Appellant at 16, 17 n.10, *Dion*, 752 F.2d 1261.

The two disestablishment cases cited by the United States are both important. First, in *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980), the parties and the federal court proceeded on the basis that the reservation had been disestablished in considering a dependent Indian community jurisdictional claim involving the City of Wagner, South Dakota, which is within the 1858 Yankton

reservation. *See* Brief of Cities at 3-6.[7] In the process of rejecting this dependent Indian community claim to preclude state jurisdiction, in *Weddell* the federal panel, without dissent, specifically noted that the disestablishment issue had been decided and conceded:

> The Supreme Court of South Dakota has twice determined that the original Yankton Indian Reservation had been diminished by an Act of Congress. *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95, 99 (1964); *State v. Williamson*, 211 N.W.2d 182, 184 (S.D. 1973). Appellant does not challenge these holdings in this appeal.

Weddell, 636 F.2d at 213 n.2.

Second, in *State v. Williamson*, 211 N.W.2d 182 (S.D. 1973), which also involved criminal offenses in the City of Wagner, South Dakota, as well as in the City of Lake Andes, South Dakota (both within the 1858 Yankton reservation), the Supreme Court of the State of South Dakota reiterated and restated its longstanding cession jurisprudence regarding "outright" cessions. Later that same month, the South Dakota Court again confirmed this cession jurisprudence and the disestablished status of a similar cession in *DeCoteau v. Dist. County Ct.*, 211 N.W.2d 843 (S.D. 1973), which was subsequently affirmed by this Court. *DeCoteau*, 420 U.S. 425 (1975).[8]

---

[7] The criminal activity in *Weddell* originated in a burglary in Wagner, South Dakota, involving the theft of rifles and shotguns by several Yankton Sioux tribal members and other individuals and the armed takeover of a nearby pork plant. The Supreme Court of South Dakota decided the initial appeals in *State v. Winckler*, 260 N.W.2d 356 (S.D 1977). In the *Winckler* opinion, a unanimous State Supreme Court reiterated that it had previously held the Yankton reservation to be "disestablished" in *State v. Williamson*, 211 N.W.2d 182 (S.D. 1973) and further cited *DeCoteau v. Dist. County Ct.*, 211 N.W. 843 (1973), *aff'd*, 420 U.S. 425 (1975). *Winckler*, 260 N.W.2d at 360.

[8] Judge Wollman, a member of the State Supreme Court at the time, concurred specially, noting:

> [T]he Act of 1894, 28 Stat. 286, expresses a congressional determination to terminate the reservation status of the por-

Eight other briefs were filed in the Eighth Circuit Court of Appeals in *Dion*. No one disagreed with the United States' disestablishment assessment of the 1894 Yankton cession act or the controlling federal and state law.

The *en banc* majority opinion in the Eighth Circuit in *Dion* acknowledged this 1894 Yankton cession act disestablishment in the following fashion, and the dissent did not disagree with this conclusion:

> In 1858, the Yankton Sioux and the United States negotiated a treaty in which the Yankton Sioux ceded and relinquished to the United States all lands claimed by the tribe except for a four hundred thousand acre tract of land[7] . . .[7] The Supreme Court of South Dakota has determined that an act of Congress in 1894 diminished the size of the original reservation. *State v. Williamson*, 87 S.D. 512, 211 N.W.2d 182, 184 (1973); *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95, 99 (1964). *See Weddell v. Meierhenry*, 636 F.2d 211, 213 n.2 (8th Cir. 1980).

Dion, 752 F.2d at 1263 & n.7 (8th Cir. 1985) (footnote omitted).[8]

---

tion of the reservation ceded, sold, relinquished and conveyed to the United States by the Yankton Tribe.

State v. Williamson, 211 N.W.2d 182, 184 (S.D. 1973). In the instant case, Judge Wollman recused himself.

The United States has now belittled *Williamson* and all state and federal Yankton disestablishment precedent prior to "*Solem* and *Hagen*," without explaining why *Seymour*, *Mattz*, *DeCoteau* and *Rosebud* do not also figure in this equation. Brief for United States as *Amicus Curiae* in Support of Plaintiffs-Appellees at 17, *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647).

[8] The *en banc* court supplemented the citations of the United States to the disestablishment cases of *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980) and *State v. Williamson*, 211 N.W.2d 182 (1973) with this reference to *Wood v. Jameson*, 130 N.W.2d 95 (1964) (The court of appeals in *Weddell* had also cited *Wood*). In a habeas corpus case, the South Dakota Supreme Court in *Wood* rejected an Indian country claim of federal jurisdiction for a crime of rape that occurred in Lake Andes, South Dakota, which

State v. Williamson, 211 N.W.2d 182 (S.D. 1973); *Wood v. Jameson*, 130 N.W.2d 95 (S.D. 1964) and *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980) all make clear that the 1858 Yankton reservation has been disestablished and that references to the present Yankton reservation are limited to the land still held in trust for the Yankton Sioux Tribe or tribal members. *See also DeCoteau*, 420 U.S. at 446. And it was in this light that the Solicitor General admitted in this Court that the "reservation" nature of the violations in *Dion* were "essentially undisputed." Brief for the United States at 15 n.19, *Dion*, 476 U.S. 734. *See also* Respondent's references to "Indian land" and "his reservation." Transcript at 20-21, *Dion*, 476 U.S. 734.

The opinion of this Court in *Dion* noted early on that the Eighth Circuit simply assumed that the birds were killed on the "reservation" and that the same assumption was made in this Court. *Dion*, 476 U.S. at 735 & n.1. With this assumption, a unanimous Court did not otherwise directly or specifically address the 1894 Yankton cession act issue. However, in the course of discussing the history of the 1858 Yankton reservation, the Court in *Dion* did cite *Wood* in the text of the opinion, in recognition of the fact that the area reserved in 1858 was initially a "legally constituted Indian reservation." *Dion*, 476 U.S. at 737 (citing *Wood*, 130 N.W.2d 95). *See* discussion of *Wood supra* at Note 9. On the very same page in *Wood* that recognized the initial legitimacy of the 1858 Yankton reservation, the *Wood* opinion begins its

---

is within the 1858 Yankton reservation. *Wood*, 113 N.W.2d 95. The *Wood* court, citing numerous state court decisions, distinguished *Seymour v. Superintendent*, 368 U.S. 351 (1962) (as this Court did later in *DeCoteau*) on the basis of the nature of this outright 1894 cession. *Wood v. Jameson*, 130 N.W.2d at 98-99. The *Wood* court also relied on this Court's venerable precedent in *United States v. Pelican*, 232 U.S. 442 (1914) and *Perrin v United States*, 232 U.S. 478 (1914) (liquor provision to apply "on or off a reservation") and concluded that the "purpose" of Congress was to "disestablish the reservation." *Wood v. Jameson*, 130 N.W.2d at 97-99. See also discussion of *Perrin* in State's Br. at 33.

discussion of the disestablishment of the 1858 Yankton reservation occasioned by the passage of the 1894 Yankton cession act (two sentences later). *Wood*, 130 N.W. 2d at 97. As noted above, the *Wood* analysis included quotations of the cession language of the 1894 cession act and early precedent of this Court, such as *United States v. Pelican*, 232 U.S. 442 (1914) and *Perrin v. United States*, 232 U.S. 478 (1914). *Wood*, 130 N.W. 2d at 97-99. Because the Eighth Circuit in *Dion* expressly cited *Wood* for this disestablishment holding, the reference to *Wood* in this Court's opinion should be viewed in this light.

One final point with respect to the views of the United States in *Dion* regarding the 1858 Yankton treaty, the 1894 Yankton cession act and subsequent acts of Congress. Apart from the previous inconsistent disestablishment concession of the United States with reference to the 1894 Yankton cession act (and all other cessions), the strained argument the United States now submits should also be examined in the context of the views the United States expressed in *Dion* regarding statutory construction and Indian treaties generally. For example:

> [T]he general circumstances of treaty negotiation in the nineteenth century which, in our view, would not have led any of the parties even to form an intention on this issue. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978), the Supreme Court emphasized that treaties with the Indians "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." The historical context of Indian treaty negotiation demonstrates that neither the United States nor the Indian signatories ever contemplated. . . .

Opening Brief for the Federal Appellant at 17-18, *Dion*, 752 F.2d 1261.

> This Court has emphasized that Indian treaties 'cannot be interpreted in isolation but must be read in light of the common notions of the day and the

> assumptions of those who drafted them.' *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 206 (1978).

Brief for the United States at 19, *Dion,* 476 U.S. 734.

> It is, of course, axiomatic that a statute must be interpreted in light of the purposes Congress sought to achieve. See, *e.g., Dickerson v. New Banner Institute, Inc.,* 460 U.S. 103, 118 (1983).

Reply Brief of the United States at 7, *Dion,* 476 U.S. 734.

> The statute should be construed in order to effectuate its purposes.

Transcript at 17, *Dion,* 476 U.S. 734.

These are important concepts. Their significance is not undermined here simply because the United States now chooses to advance an argument that is at odds with acknowledged congressional assumptions and overall congressional purposes.

7. *Yankton Sioux Tribe v. South Dakota,* 796 F.2d 241 (8th Cir. 1986), *cert. denied,* 483 U.S. 1005 (1986). Apart from *Dion,* the United States has only had one opportunity since *DeCoteau* (but before the present litigation) to tell this Court specifically about the *Yankton* statute and how it compared to the *DeCoteau* statute. In that instance, involving a lakebed, the cession comparison is also telling:

> [T]he United States' right to control Lakes Andes and its bed, to the exclusion of the Yankton Sioux Tribe, is in any event secured by the 1892 Cession Agreement. . . . First, Article I is framed in terms that this Court has repeatedly characterized as "express language of cession." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe,* No. 83-2148 (July 2, 1985), slip op. at 15 n.19; *Solem v. Bartlett,* 465 U.S. 463, 469 (1984). In *DeCoteau v. District County Court,* 420 U.S. 425, 445 (1975) (emphasis added), this Court, in considering *a similar and contemporaneous cession* agreement, found that *the same language* was "precisely suited" to the purpose

> of conveying to the United States, "for a sum certain, *all of* [*the Indians'*] interest in *all* of their unallotted lands."
>
> Second, the retention of the lakebed by the Tribe would have been inconsistent with the *purposes* of the 1892 Cession Agreement. Those *purposes* consisted not only of opening additional lands for non-Indian settlement, but also of paving the way for the anticipated end of the tribal way of life. . . .

BUS, Co. Pet. App. at 165a, 166a (emphasis on all in original).

While it remains to be seen exactly what the United States might tell this Court now, the County would submit that in this excerpt in the 1986 Brief in Opposition, the United States has already said everything worth saying ("a similar and contemporaneous cession"). This *Yankton* lakebed litigation was pending for over a decade. Although reservation disestablishment was not decided, the Yankton cession agreement was central to the arguments for the United States and other parties. As such, it was thoroughly reviewed and discussed in all respects. At that time, Article XVIII of the Yankton agreement, viewed in context, was not noteworthy and did not even merit special attention in the argument of the United States.

Not surprisingly, the position of the United States on this issue was subsequently modified to one that now supports the recognition of the original Yankton reservation. In the court of appeals, Article XVIII figured prominently in the new argument.

8. *Hagen v. Utah*, 510 U.S. 399 (1994). *Hagen* reflects the most recent views of this Court in resolving disestablishment issues. Due to the history of the Utah legislation, the United States devoted most of its arguments in *Hagen*—naturally in favor of a recognition of original reservation boundaries—to "public domain" terminology. These arguments were generally rejected in *DeCoteau*. Again, in *Hagen* this Court squarely rejected them.

The United States also strongly argued that a cession and sum certain agreement was broadly understood to effect disestablishment:

> Language that "[e]xplicit[ly] refer[s] to *cession*" or otherwise "evidence[es] the present and total surrender of all tribal interests" in the opened area suggests that Congress *meant to sever it* from the reservation. *Ibid.* When such language is buttressed by an unconditional commitment to compensate the tribe, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished."[14] [14] In the presence of both of those factors, the Court found a reservation to have been extinguished in *DeCoteau v. District County Court*, 420 U.S. 425, 431-449 (1975).
>
> But the statute at issue in *Rosebud* contained explicit language of *cession*. . . .
>
> That language does not refer to a "*cession*" or otherwise "evidenc[e] the present and total surrender of all tribal interests" in the opened land. . . . [C]ontrasts sharply with that of the statutes at issue in *DeCoteau* and *Rosebud*, the two recent cases in which the Court has found that reservation boundaries were altered by Congress. See *DeCoteau*, 420 U.S. at 445 (statute provided that the Indians did "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands," Act of Mar. 3, 1891, ch. 543, 26 Stat. 1036); *Rosebud*, 430 U.S. at 596-597 (statute provided that Indians did "hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted." Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254). In sum, the 1905 Act contains neither an "[e]xplicit reference to cession" nor any other "language evidencing the present and total surrender of all tribal interests" in the portion of the Reservation opened to non-Indian settlement. *Accordingly*, under *Solem*, it fails to demonstrate a clear congressional intention to alter the boundaries. . . . [L]an-

> guage demonstrating that Congress provided for the total surrender of all tribal interests in the portions of the Reservation. . . . Act does not refer to any *cession*. . . .
>
> As the *Rosebud* Court explained, a ruling that the Rosebud Sioux Reservation was not diminished by the 1904 Act at issue there could only have frustrated congressional intent. The statute used *unequivocal language of cession*, and adopted an agreement of the Indians that unequivocally approved the cession (albeit with modifications approved by only a simple majority of the adult male Indians). . . .
>
> [N]one of the relevant documents . . . uses the *indisputable language of cession* that was a feature of all of the relevant documents in *Rosebud*. Moreover, in our view, the *requirement* in *Solem* that the "understanding" be "widely held" requires *proof* that the Indians shared in an understanding that alteration of the Reservation's boundaries was at hand; the *only* obvious manifestation of such an understanding on the part of the Indians is *an agreement of cession*, like the one approved in *Rosebud*.

BUS, Co. Pet. App. at 138a, 141a n.20, 142a, 143a, 149a, 150a (emphasis added).

Significantly, in this instance the United States also participated in oral argument and made explicit representations as to the effect of the use of cession language:

> MR. MANN: . . . [*T*]*he language of cession*. That seems to be—that phrase seems to be the phrase *Congress used when it intended to alter the boundaries of a reservation*.
>
> QUESTION: Well, when it intended to alter the boundaries of the reservation by cession. That much is clear.

Tr. at 26, *Hagen* (No. 92-6281).

The County certainly would not attempt to improve upon the gist of this exchange. Nothing more need be said on this point.

9. *Yankton Sioux Tribe v. Southern Missouri Waste District*, 99 F.3d 1439 (8th Cir. 1996). The United States did not participate in this litigation in the district court. In the court of appeals, the United States, as *amicus curiae*, told the court that because the federal government retains jurisdiction over Indian country generally, the continuing integrity of the exterior boundaries of Indian reservations is of "significant import." Br. of the United States at 1, *Yankton Sioux v. Southern Missouri*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647). (The United States did not contest the fact that federal jurisdiction had *not* been exercised in this area for over a century).

Moreover, the United States argued, for the first time, that it had a strong interest in protecting "the integrity of reservation boundaries" because of its "special relationship with Indian tribes." *Id.* The strength of this interest presumably overpowered any inclination to present, address, explain or defend any of the previous United States' cession arguments that were plainly inconsistent with continued reservation status, including the *Dion* disestablishment concession. The United States mentioned none of this and simply noted: "We do not agree with the arguments raised by the County in its brief. They are irrelevant to this case." *Id.* at 19 n.11.[10]

Only two points in the novel argument now advanced by the United States in support of original reservation boundaries are significant at this point in time. First, the commendable concession that this Court's 1914 Yankton decision in *Perrin v. United States*, 232 U.S. 478 (1914), "assumed" disestablishment. *Id.* at 19 n.10. And secondly,

---

[10] At oral argument in the companion case of *United States v. Greger*, 98 F.3d 1080 (8th Cir. 1996), the United States glossed over the 1894 cession act because, unlike the act in *Hagen*, it did not contain probative public domain language on its face. In *Hagen*, the premise of the argument of the United States was just exactly the reverse: public domain language was meaningless, cession language would have been dispositive. *See* text at 28, *supra*.

that as late as 1985 the United States (and everyone else) was continuing to make this same assumption:

> [T]he United States stated in a footnote in its brief that, based on decisions of state courts in South Dakota, the reservation had been diminished by the 1894 treaty.

Id. at 18 n.8.

The panel majority should have been more reluctant in disregarding this venerable precedent.[11]

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

---

[11] Another generic argument that the United States has endorsed and submitted in litigation of this kind promises even more unsettling consequences than the simple reversal of the position of the United States in regard to the 1894 Yankton cession statute. (In light of this Court's precedent, the County has every reason to believe that this Court will squarely reject the revised Yankton cession views of the United States in this case). But the new argument of the United States, submitted subsequent to *Hagen* in the Tenth Circuit and now in the Eighth Circuit Court of Appeals, summarily undermines the effect of all disestablishment precedent on reservation boundaries and would leave local jurisdictions such as Charles Mix County in almost impossible situations.

Because it is beyond the scope of this brief, others have addressed the decisions that recently endorsed this position. *See Ute Indian Tribe v. State of Utah*, 935 F. Supp. 1473 (D. Utah 1996) and *Ute Indian Tribe v. State of Utah*, 114 F.3d 1513 (10th Cir. 1997), where this argument recently received favorable consideration, after *40 months* of needless post-*Hagen* litigation, which is not over yet. *See* Brief of Duchesne County, Utah, and Uintah County, Utah *Amici Curiae*. The County has reproduced the argument itself as the United States submitted it in Co. App. at 1a, *infra*.

Respectfully submitted,

MATTHEW F. GAFFEY
Charles Mix County
State's Attorney
P.O. Box 370
Lake Andes, SD 57356
(605) 487-7441

TOM D. TOBIN
Counsel of Record
TOBIN LAW OFFICES, P.C.
422 Main Street
P.O. Box 730
Winner, SD 57580
(605) 842-2500

Attorneys for Amicus Curiae

Dated: August 7, 1997

Excerpt from Page 17 (Footnote 6) From Brief for United States as Amicus Curiae in Support of Plaintiff's-Appellee's, Yankton-Sioux Tribe v. Southern Missouri Waste Management Dept., 99 F. 3d 1439 (8th Cir. 1997) (95-2647).

* * * *

Article I of the 1892 Agreement provides only that "the unallotted lands within the limits the [Yankton Sioux] reservation" are ceded to the United States, and it was only such lands that were covered by the Presidential Proclamation of May 16, 1895. As a result, the State's reliance on Articles I and II of the 1892 Agreement for the proposition that the Reservation was diminished can extend no further than those unalloted lands. The other lands owned by non-Indians on the Reservation presumably were once allotted to tribal members but later sold to non-Indians. The State has pointed to nothing in the 1892 Agreement to suggest that these lands were removed from the Reservation any more than that the allotted lands that remain in Indian ownership were removed from the Reservation. The State's argument in this case, therefore, would yield the anomalous result that some non-Indian land within the Reservation boundaries is part of the Reservation and some is not, which would complicate the jurisdictional maze beyond even that caused by the checkerboard pattern of Indian ownership. Because only Congress may alter reservation boundaries, *see Solen*, 465 U.S. at 470, the size of (and parcels constituting) the Reservation could not have been affected by subsequent transfer of lands from Indians to non-Indians.

* * * *

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 8 Misc.

PAUL SEYMOUR, PETITIONER

v.

MERLE E. SCHNECKLOTH, SUPERINTENDENT
OF WASHINGTON STATE PENITENTIARY

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

---

MEMORANDUM FOR THE UNITED STATES

The Court has requested the view of the United States as to whether the lands involved in the above-entitled case are Indian lands.

The record in this case shows the land involved as follows:

> On the southwest corner of 6th Avenue and Jackson Street (formerly 10th Street) in East Omak, Okewogan County, Washington; that said premises are more particularly described as Lot 9, Block 118 of the government townsite of Omak and situated in Section 36, Township 34, North Range, 26 E.N.M.

According to the records of the Department of Interior, this land is not held in a trust status for any Indian nor is it held by an Indian subject to restrictions against alienation. Nevertheless, it is the position of the Department of Interor, with which the Department of Justice agrees, that the land is "Indian country" as that term is defined in 18 U.S.C. 1151.

18 U.S.C. 1151 provides in pertinent part that Indian country means "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." The land here is, in our view, "within the limits" of an Indian reservation.

The Colville Reservation, as originally established by executive order in 1872, was bounded on the north by the international boundary and on the south by the Columbia River. See Royce, *Indian Land Cessions in the United States*, Washington Map 1, No. 536. That part of the original reservation approximating the north half was ceded to the United States and the reservation was diminished to approximately the south half in 1892. See Royce, *op cit.*, Washington Map 2, No. 717. While it is true that the Act of March 22, 1906, 34 Stat. 80, made provision for allotments on the diminished reservation and authorized the sale and disposition of the unallotted lands subject to payment of the proceeds of the sales to the Indians, this did not destroy the existence of the reservation. The Department of Interior continued to recognize the entire diminished or "south half" as the Colville Reservation. The Act of July 24, 1956, 70 Stat. 626, specifically provides in section 1 that "the undisposed-of lands of the Colville Indian Reservation, Washington, dealt with by the Act of March 22, 1906 (34 Stat. 80), are hereby restored to tribal ownership to be held in trust by the United States to the same extent as all other tribal lands on the existing reservation, subject

to any existing valid rights." Section 2 of that Act, authorizing exchanges to effect land consolidation between Indians and non-Indians in Okawogen County, provides that the "acquisition of lands pursuant to this Act shall be limited to lands within the boundary of the reservation." This seems a clear recognition by Congress that lands opened under the Act of 1906 are still within the existing boundaries of the Colville Reservation.

Since it is the boundaries of the reservation, rather than the fee title to the property, which is controlling under 18 U.S.C. 1151, the land in issue seems to us to be in "Indian Country." Hence, under 18 U.S.C. 1153, the crime of burglary would be punishable by the United States, and not the state.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

SEPTEMBER 1960.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 71-1182

RAYMOND MATZ, PETITIONER

v.

G. RAYMOND ARNETT

On Writ of Certiorari to the
California Court of Appeal, First District

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE

OPINIONS BELOW

The order of the Supreme Court of California denying petitioner's application for review (Pet. App. C) was entered on December 16, 1971. The opinion of the Court of Appeal, First District (Pet. App. A), is reported at 20 Cal. App. 3d 729, 97 Cal. Rptr. 894.

JURISDICTION

On December 16, 1971, the Supreme Court of California denied petitioner's application for review. A petition for a writ of certiorari was filed with this Court on March 14, 1972, and was granted on January 15,

1973. This Court's jurisdiction rests on 28 U.S.C. 1257(3).

EXECUTIVE ORDER AND STATUTES INVOLVED

The Executive Order of October 16, 1891, I. Kappler, *Laws and Treaties* 815 (1904), reads as follows:

> EXECUTIVE MANSION OCTOBER 16, 1891
>
> It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 8, 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; *Provided, however,* That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.
>
> BENJ. HARRISON.

The Act of June 17, 1892, 27 Stat. 52, reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That all of the lands embraced in what was Klamath River Reservation in the State of California, as set apart and reserved under authority of law by an Executive order dated November sixteenth, eighteen hundred and fifty-five, are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands: *Provided,* That any Indian now located upon said reservation may, at

any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself and, if the head of a family, for the members of his family, under the provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and, if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof: *Provided,* That lands settled upon, improved, and now occupied by settlers in good faith by qualified persons under the land laws shall be exempt from such allotment unless one or more of said Indians have resided upon said tract in good faith for four months prior to the passage of this act. And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians. And any person entitled to the benefits of the homestead laws of the United States who has in good faith prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing proviso and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law shall have the preferred right, at the expiration of said period of one year to enter and acquire title to the land so settled upon, not exceeding one hundred and sixty acres, upon the payment therefor of one dollar and twenty-five cents an acre, and such settler shall have three months after public notice given that such lands are subject to entry within

which to file in the proper land office his application therefor; and in case of conflicting claims between settlers the land shall be awarded to the settler first in order of time: *Provided,* That any portion of said land more valuable for its mineral deposits than for agricultural purposes, or for its timber, shall be entered only under the law authorizing the entry and sale of timber or mineral lands: *And provided further,* That the heirs of any deceased settler shall succeed to the rights of such settler under this act: *Provided further,* That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children.

Approved, June 17, 1892. [Bold type shows language added by Senate amendment of House bill.]

18 U.S.C. 1151 reads as follows:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. 1162 provides in relevant part:

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses

committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
* * * *	
California	All Indian country within the State.
* * * *	

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; * * * or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping or fishing or the control, licensing, or regulation thereof.

The California Fish and Game Code, Section 12300, reads as follows:

Irrespective of any other provisions of law, the provisions of this code are not applicable to California Indians whose names are inscribed upon the tribal rolls, while on the reservation of such tribe and under those circumstances in this State where the code was not applicable to them immediately prior to the effective date of Public Law 280, Chapter 505, First Session, 1953, 83d Congress of the United States.

QUESTION PRESENTED

Whether petitioner's fishing nets were seized by the State of California within Indian country as defined by 18 U.S.C. 1151 (62 Stat. 757, as amended by 63 Stat. 94).[1]

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's of October 10, 1972, inviting the Solicitor General to express the views of the United States in this case.

STATEMENT

This action was brought by the respondent, director of the state Department of Fish and Game, for the forfeiture of five nylon gill nets owned by the petitioner on the ground that he used the nets in violation of California's fish and game laws. The nets were seized by a state game warden on September 24, 1969. The nets were stored in open containers upon land owned by a lumber company within 200 feet of the Klamath River on land that had once been part of the Klamath River Reservation and that had been made part of the Hoopa Valley Reservation by Executive Order in 1891 (Pet. App. A, p. 1; Pet. App. B, pp. 4-5).

The petitioner intervened to resist the forfeiture alleging that he is an enrolled Indian of the Yurok (Klamath River) Tribe, that the nets were seized within Indian country as defined by 18 U.S.C. 1151, and that the California law prohibiting use of the nets was therefore inapplicable.

---

[1] Having ruled that the land where the nets were seized was not Indian country, the California courts did not reach the issue whether, if the land is Indian country, petitioner is a beneficiary of rights which either are preserved from state regulation by 18 U.S.C. 1162(b), *supra*, or entitle him to the exemption of California Fish and Game Code, Section 12300, *supra*. See Pet. App. A, pp. 1-2.

The trial court held that the land where the nets were seized was not "Indian country" within the scope of 18 U.S.C. 1151 and was not within an Indian reservation within the meaning of California Fish and Game Code, Section 12300, because the Act of June 17, 1892, which had opened the Reservation for public purchase of excess land had, in effect, terminated the twenty miles of the reservation nearest to the Pacific Ocean (Pet. App. B, pp. 1-2). The state Court of Appeal affirmed the decision on the same grounds (Pet. App. A), and the Supreme Court of California denied petitioner's application for review (Pet. App. C). Petitioner then filed a petition for a writ of certiorari in this Court, which granted the petition on January 15, 1973.

SUMMARY OF ARGUMENT

I. The events leading to the Act of June 17, 1892, show that the Act did not terminate the portion of the Hoopa Valley Reservation to which it applied. The seaward twenty miles of the addition to the Hoopa Valley Reservation had been the Klamath River Reservation. Because of legal problems in maintaining multiple separate reservations, the President, by Executive Order in 1891, had made the Klamath River Reservation part of the Hoopa Valley Reservation. The reference in the 1892 act to "what was the Klamath River Reservation" merely designates the portion of the addition to the Hoopa Valley Reservation that had previously been a separate reservation. It does not indicate a congressional abolition of half of the just created Hoopa addition.

The Act of 1892 can properly be understood only in light of the General Allotment Act which Congress had recently passed. In that Act Congress maintained Indian reservations but permitted allotments of land within reservations to individual Indians and sales of surplus land to non-Indians. The General Allotment Act, however, did not require the President to make allotments within any particular reservation. Consequently a number of Acts

requiring allotments and disposal of surplus land within particular reservations were passed. The 1892 Act was such an Act. Nothing in the Act purports to terminate the part of the reservation to which it applies. When Congress has wished to terminate all or part of a reservation it has done so explicitly.

II. The consistent course of administrative and congressional action subsequent to the Act of 1892 supports the proposition that that Act did not abolish the Klamath River portion of the Reservation. The Department of the Interior, shortly after the passage of the Act, was required to determine whether allotments made under the Act were allotments on or off a reservation. In a carefully reasoned and documented opinion the Department in charge of administering the Act ruled that the Act reconfirmed, rather than cast doubt upon, the continued existence of the Reservation. This has been the consistent view of the Department of the Interior, and has also been the premise on which Congress has subsequently acted.

III. The decisions of this Court has consistently held that Acts opening reservations or parts of reservations for allotment and disposal of surplus land for the benefit of the resident Indians do not thereby abolish the reservations. *Seymour* v. *Superintendent*, 368 U.S. 351, is, in our view, controlling here. The Act of 1906 in question in *Seymour*, 34 Stat. 80, was identical in effect to the Act in question here. This Court held that that statute, while requiring allotment and disposal of surplus land in the Colville Reservation, did not thereby terminate the Reservation. Moreover, although one of the primary purposes of the extension of the Hoopa Valley Reservation was to secure the Indians' fishing rights in the Klamath River, nothing in the 1892 Act purported to terminate those rights. An intent to take such rights without compensation merely by implication should not be presumed.

ARGUMENT

I. THE EVENTS LEADING TO THE ACT OF JUNE 17, 1892, 27 STAT. 52, AND THE ACT ITSELF SHOW THAT THE ACT DID NOT TERMINATE THE ADDITION TO THE HOOPA VALLEY RESERVATION CREATED BY EXECUTIVE ORDER ONLY MONTHS BEFORE, ON OCTOBER 16, 1891

A. The History of the Establishment of the Reservation

The Yurok Indians historically have been fishing people who live on the lower Klamath River near the Pacific Ocean, the area in question here. See Kroeber, *Handbook of the Indians of California*, p. 1 (1925).[2] Their very name means "downstream" in the language of the adjacent Karok Tribe. Kroeber, *supra*, at p. 15.

On November 16, 1855, as authorized by the Act of March 3, 1855 (10 Stat. 686, 699), President Pierce set apart as an Indian reservation a strip of territory extending along the Klamath River for a width of one mile on each side for a distance of twenty miles inland from the Pacific Ocean. The area is a deep gorge, consisting of craggy timberland rich in redwood and pine with little arable land except at the river bank. The area was chosen because the Indians had always lived there and had depended largely on fish from the Klamath River for their diet and trade.[3]

In his 1861 Annual Report (quoted in 33 I.D. at 216) the Commissioner of Indian Affairs described the Reservation as follows:

---

[2] There are excerpts from Kroeber at A. 34-44.

[3] See 1858 Annual Report of the Commissioner of Indian Affairs, p. 286, quoted in *Crichton* v. *Shelton*, 33 Decisions of the Department of the Interior (I.D.) 205, 216. See also 33 I.D. at 205-206.

> This reservation is well located, and the improvements are suitable and of considerable value. There is an abundance of excellent timber for fencing and all other purposes, and at the mouth of the Klamath river there is a salmon fishery of great value to the Indians.

In 1861 the Klamath river flooded and destroyed many of the Indian villages. This led the Interior Department to attempt a temporary relocation of the Yurok and other Klamath River Indians to a reservation on the Smith River, but few left and most of those soon returned.[4] The Smith River reservation was thereafter abolished.[5]

In 1864 the Hoopa Valley Reservation, a 12-mile square about 50 miles inland from the mouth of the Klamath River, was created by administrative order authorized by the Act of April 8, 1864 (13 Stat. 39) (later confirmed by Executive Order of June 23, 1876, I Kappler, *supra*, at p. 815). Its creation inadvertently cast doubt on the continued *legality* of the Klamath River reservation (not on its occupation or use by Indians). This was so because the Act of April 8, 1864, *supra*, which authorized the President to create new Indian reservations within California, limited the number of new and old reservations to four, and, arguably, the President had exceeded that number. Indeed, in 1889 the Circuit Court for the Northern District of California ruled that because of the President's failure to list the Klamath River Reservation as one of the four, it was no longer legally a reservation. *United States* v. *Forty-Eight Pounds of Rising Star Tea*, 38 Fed. 400.

It was in response to this decision that, in order to preserve the Klamath River Reservation, President Harrison issued the Executive Order of October 16, 1891 (p. 2, *supra*) extending the Hoopa Valley Reservation to

---

[4] See *Crichton, supra*, 3 I.D. at 208.

[5] Act of July 27, 1868, 15 Stat. 198, 221.

the sea in a strip one-mile wide on each side of the Klamath River so as to include the former Klamath River Reservation. In *Donnelly* v. *United States*, 228 U.S. 243, this Court upheld the validity of the 1891 Executive Order extending the Hoopa Reservation to the sea.[6]

B. The Act of June 17, 1892 and the General Allotment Act

In our view, the Act of June 17, 1892, can properly be understood only in light of two considerations: (1) what Congress had done five years earlier in the General Allotment Act (Act of February 8, 1887, 24 Stat. 388) and (2) the changes made in the 1892 Act during the legislative process in order to incorporate Allotment Act provisions in it.

1. By the 1880's and 1890's the Indians in the West had given up vast areas of land, but they still had substantial holdings in the form of reservations, created by treaty, executive order, or statute. During this period there was much pressure on Congress to remove land from these reservations and make it available for settlement and exploitation by non-Indians. But there was also considerable feeling that to do so would violate treaties and generally break faith with the Indians who had been induced to give up larger areas of land and to become peaceful in return for federal protection and the reservations created for them. The General Allotment Act of 1887 was to some extent a congressional compromise of these conflicting pressures and considerations.

The policy of the Act was to continue the reservation system and the trust status of Indian land at least for

---

[6] *Donnelly* concerned a crime committed within the "connecting strip" joining the former Hoopa and Klamath River Reservations. The Court consequently did not specifically consider the effect of the Act of 1892. However, it characterized it as "opening" that part of the reservation to "settlement, entry and purchase," 228 U.S. at 253, not as terminating or abolishing it.

the time being, but to allot individual tracts to Indians (in trust) which they would be encouraged to farm. When all the land had been allotted and the trusts had expired, the reservation could be abolished.[7] In the meantime, since acreage limitations were put on the allottments, there would usually be surplus land within reservations which could be made available to non-Indians. It was hoped that the resulting juxtaposition of the two races would be edifying to the Indians and encourage them to adopt white ways.[8]

While the General Allotment Act thus permitted the President to make allotments of reservations lands and, with tribal consent, to sell surplus lands, it did not require him to do so. Congress, therefore, occasionally enacted special legislation to assure that a particular reservation would be opened for allotment and non-Indian settlement. The Act of June 17, 1892, at issue in this case, is an example of such legislation.[9]

Because of the General Allotment Act and these special Acts opening land within reservations to settlement, it is common today to have extensive non-Indian holdings within reservations. As we show in point III, *infra*, however, allotments to Indians and sales to non-Indians, whether under the General Allotment Act or special Acts, do not in themselves terminate the reservations or even make the lands therein held by non-Indians cease to be Indian country. *Seymour* v. *Superintendent*, 368 U.S. 351, 357-359; *Ellis* v. *Page*, 351 F.2d 250 (C.A. 10); *State* v. *Molash*, 199 N.W. 2d 591 (Sup. Ct. S.D.).

---

[7] The original trust period was to be 25 years, but those periods have often been extended. See p. 21, *infra*.

[8] See, generally, United States Department of the Interior, Federal Indian Law, pp. 115-117, 127-129, 776-777 (1958).

[9] The policy of allotment and sale of surplus lands within reservations was repudiated in the Indian Reorganization Act of 1934, 48 Stat. 984 *et seq.*, as amended, 25 U.S.C. 461 *et seq.*

2. The pressures of non-Indians to obtain some of the land and especially the redwood forests within the Klamath River Reservation were particularly strong. In 1879, at the request of the Department of the Interior, military forces were used to evict trespassers. Thereafter, the Secretary decided in 1883 to make allotments to Indians living on the reservation, but he revoked the decision because of inadequate surveys and nothing further was done at that time to make allotments or authorize white settlement.[10] In October 1891, the President reaffirmed the existence of the reservation by his Executive Order incorporating it into an extension of the Hoopa Valley Reservation (see p. 2, *supra*).

House Bill, H.R. 38, 52d Cong., 1st Sess., which after amendment became the Act of 1892 at issue here, was reported out of committee on February 5, 1892[11] and was passed by the House on March 1, 1892,[12] only months after the President had reaffirmed the existence of the reservation. The apparent purpose of the House Bill[13] was to seek to open the reservation to non-Indian interests without raising too much opposition. Its language did not purport to terminate the Reservation (the Hoopa extension) just created by the President, and it did not purport to "diminish" the Reservation. Nor did it call for the removal of the Indians.

The bill first designates, as the area to which it applied, what was "Klamath River Reservation"—thus only the seaward portion of the just created extension of the Hoopa Valley Reservation. The bill opened the designated

---

[10] See Annual Report of the Commissioner of Indian Affairs for 1885, quoted in part in *Crichton*, *supra*, 33 I.D. at 214.

[11] H. Rept. No. 161, 52d Cong., 1st Sess.

[12] 23 Cong. Rec. 1598-1599.

[13] At pages 2-3, *supra*, we have set forth the 1892 Act with the House language in normal type and the language added by the Senate in bold type.

portion of the Reservation for settlement under the homestead, mineral and timber laws. However, it recognized that there were both Indian villages and settlements within that part of the reservation and authorized the Secretary of the Interior to set those apart for permanent use by the Indians. The bill provided for confirmation of title for non-Indians who had settled on reservation land not constituting Indian villages or communities, and specified that the funds derived from the sale of the land "shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children." The House bill thus recognized a continuing Indian community and a continuing federal responsibility for Indians living in this portion of the reservation.

The Senate, however, was not satisfied that the House bill adequately protected Indian interests; it amended the bill and called for a conference with the House. 23 Cong. Rec. 3918-3919. As a result of the Senate amendment, the first two provisos of the Act were added (see p. 3, *supra*, bold type). In these provisos the area in question is referred to as a "reservation" and "any Indian now located upon said reservation" is permitted to "apply to the Secretary of the Interior for an allotment of land for himself and * * * for the members of his family, under the provisions of * * * [the General Allotment Act]." In other words, the Senate, dissatisfied with the House bill, which would have allowed non-Indian settlement without first providing for Indian allotments, brought the Act into line with the General Allotment Act, with the difference that Congress ordered the opening rather than leaving it to the President with the consent of the Indians.[14]

---

[14] Senator Dawes, the author of the General Allotment Act, sat on the Conference Committee. See 32 Cong. Rec. 3919. Because the House bill was significantly amended in the Senate and in the Conference Committee before it was enacted, respondent errs in

Nothing in the Act, or even in the House bill, purports to abolish the Reservation. The reference in the Act to "what was the Klamath River Reservation" merely identifies the part of the extension of the Hoopa Valley Reservation to which the Act applied (see p. 15, *supra*). The court below erred in relying on this descriptive designation as indicating abolition of the Reservation. When Congress has wished to abolish an Indian reservation, it has used direct and unambiguous language to accomplish that purpose. For example, when Congress abolished the nearby Smith River Reservation it stated: [T]he Smith River reservation is hereby discontinued." 15 Stat. 221. And when several Oklahoma Reservations were abolished, the tribes agreed to "'cede, convey, transfer, relinquish, and surrender, foreover and absolutely, without any reservation' all their claim in and to the lands embraced within the designated reservation." *Ellis* v. *Page*, 351 F.2d 250, 252 (C.A. 10).

In another example, Congress specified:

> [T]he reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby abolished. 33 Stat. 218.

See also 68 State. 250 (providing for the abolition of the Menominee Reservation): *State* v. *Molash*, 199 N.W.

---

relying (Br. pp. 5-7) on statements in the House Report accompanying that bill which do not reflect the amendments designed to protect the interests of Indians living on the Reservation. Those amendments are inconsistent with the statements in the House Report (and with isolated similar statements by individuals during the floor debates) that the Klamath River area was no longer being used as a reservation—a statement as to which the Department of the Interior later declared "the committee was apparently mistaken * * *" (*Crichton*, *supra*, 33 I.D. at 214). Moreover, although the House Report is dated more than 5 months after the Executive Order establishing the extension of the Hoopa Valley Reservation (see p. 15, *supra*), it makes no mention of this highly significant Presidential action affecting the land and people in question.

2d, 591 (Sup. Ct. S.D.); *Leech Lake Band* v. *Herbst*, 334 F. Supp. 1001 (D. Minn.)

The contrast of these statutory provisions with the Act at issue here is highly significant—particularly in light of the 1892 Act's provisions recognizing that Indians individually and in villages and communities would continue to live in the area and would continue to be under federal protection (see p. 4, *supra*).[15]

And there is nothing in the Act suggesting any loss of fishing rights for the Indian residents of the area or diminution of federal jurisdiction over the area.

II. THE CONSISTENT COURSE OF ADMINISTRATIVE AND CONGRESSIONAL ACTION SUBSEQUENT TO THE ACT OF JUNE 17, 1892, SUPPORTS THE PROPOSITION THAT THE ACT DID NOT ABOLISH THE KLAMATH RIVER PORTION OF THE 1891 EXTENSION OF THE HOOPA VALLEY RESERVATION

Interpretation of a law by the government agency responsible to administer it is entitled to great weight.

---

[15] In 1893, pursuant to the 1892 Act and the General Allotment Act, 161 allotments were granted to Indians residing on the Klamath River part of the Hoopa Extension, thus demonstrating a sizeable Indian community at the time the Act was passed. These allotments averaged 60 acres each, totaling 9,762 acres, 40% of the approximately 25,000 acres of the part of the reservation opened for settlement. Finding of Fact No. 83, p. 57, Report of Commissioner in *Jessie Short, et al.* v. *United States*, C.Cls. No. 102-63. At the trial of the present case evidence was submitted showing that petitioner's mother holds such an allotment and that his fishing was in the close vicinity of that allotment (A. 28-31).

In *Jessie Short*, pending in the United States Court of Claims, the issue is whether the joining of the two reservations gave all Indians residing therein rights in the whole or whether each group has rights only within its original portion. Neither the United States nor the other parties to that suit contest the continued existence of the whole as an Indian reservation though the decision of the California court of appeal in this case is, of course, noted.

Griggs v. *Duke Power Co.*, 401 U.S. 424, 433-434; *Udall* v. *Tallman*, 380 U.S. 1, 16. The consistent course of administrative interpretation by the Department of the Interior has been, and remains, that the Klamath River Reservation was not abolished by the 1892 Act and still survives.

In 1904 the Department of the Interior was required to rule on whether an allotment made in the Klamath River Reservation portion of the Hoopa Extension under the Act of June 17, 1892, was an allotment within an Indian reservation or outside a reservation. *Crichton* v. *Shelton*, 33 I.D. 205. The question of the survival of the Reservation after the 1892 Act was squarely presented. In a carefully reasoned and fully documented opinion, the Department ruled that the challenged allotments were allotments on a reservation, and that the 1892 Act, in authorizing such allotments, reconfirmed, rather than cast doubt upon, the continued existence of the Reservation. 33 I.D. at 219-220. This contemporaneous interpretation of the 1892 Act was rendered, not by the Bureau of Indian Affairs, but by the Department of the Interior—the Department charged with administering the Act both as to Indians (through the Bureau of Indian Affairs), and as to non-Indian settlers (through the Land Office).

The opinion is significant not only for its holding, but also for the thorough factual and historical background it set forth at a time when the events were less remote. Of particular importance here is the opinion's carefully documented statement that (33 I.D. at 217):

> * * * the lands within the reservation are peculiarly adapted to the purposes for which it was set apart, reference being had to the location of said lands and the habits and necessities of the Indians [occupying them]. There is little question that the prevailing motive for setting apart the reservation was to secure

to the Indians the fishing privileges of the Klamath River . * * *

Testimony at a congressional hearing held in 1932 [16] confirms that the Department of the Interior still considered the seaward twenty miles of the Klamath River to be an Indian reservation. O. M. Boggess, Superintendent (for 12 years) of the Department's Hoopa Indian Agency, in a statement taken at Hoopa California, September 24, 1932, testified (A. 14):

> Mr. BOGGESS. This reservation is 12 miles square and then there is an extension 1 mile on each side for an aditional 50 miles down the Klamath River to the east [sic] coast.
>
> Senator FRAZIER. Is it all connected?
>
> Mr. BOGGESS. Yes; and it is all classed by the Indian Office as one reservation.
>
> Senator FRAZIER. What do they call this reservation?
>
> Mr. BOGGESS. They call it the Hoopa, and the mile strips they call the Klamath.

The Department of the Interior today administers the entire 1891 extension to the Hoopa Valley Reservation as an Indian reservation. See note 15, *supra*.[17]

Moreover, after it authorized entry to surplus lands in the 1892 Act, Congress also continued to treat the Klamath River Reservation as an existing reservation. Indians had continued to live on this part of the Hoopa Extension (as they do today), but the trust period on their allotments had expired in 1919. Instead of considering its responsibilities terminated in this area, Con-

---

[16] 72d Congress, *Survey of Conditions of the Indians in the United States*, Part 29, California, U.S. Printing Office 1934. See A. 12-16.

[17] See, also, map of Indian Land Areas published by the Department of the Interior in 1971, which we have lodged with the Clerk of this Court.

gress in the Act of December 24, 1942, 56 Stat. 1081, 25 U.S.C. 348a, extended "The period of trust on lands allotted to Indians of the Klamath River Reservation * * *," reimposing "the trust on certain lands allotted to Indians of the Klamath River Reservation, California." And in the Act of May 19, 1958, 72 Stat. 121, Congress restored to tribal ownership 159.57 acres of "vacant and undisposed-of-ceded lands * * * on the following named Indian reservations * * * : Klamath River, California * * *." Compare *Seymour* v. *Superintendent*, 368 U.S. 351, 356.

III. THIS COURT'S DECISIONS INDICATE THAT THE FOREGOING CONSIDERATIONS ESTABLISH THE CONTINUED EXISTENCE OF THE RESERVATION

1. The Act of June 17, 1892, is only one of many Acts which between 1887 and approximately 1913 opened Indian reservations for allotments to individual Indians and settlement of surplus lands by non-Indians.[18] These Acts are modifications of the General Allotment Act designed to apply to specific reservations. While they vary in detail, they rather uniformly provide for allotments to individual Indians within the reservation, make surplus land available to homesteaders, and provide that the proceeds from the disposition of the surplus lands will be used for the benefit of Indians on the reservation. The question whether such Acts make either land allotted to Indians or land patented to non-Indians no longer

[18] See, *e.g.*, Act of March 2, 1889, 25 Stat. 888 (Sioux Reservations), *United States* v. *Nice*, 241 U.S. 591; Act of March 22, 1906, 34 Stat. 80 (Colville Reservation), *Seymour* v. *Superintendent*, 368 U.S. 351; Act of May 29, 1908, 35 Stat. 460 (Cheyenne River Reservation), *United States ex rel. Condon* v. *Erickson*, 344 F. Supp. 777 (D. S.D.); Act of June 1, 1910, 36 Stat. 455 (Fort Berthold Reservation), *The City of New Town, North Dakota* v. *United States*, 454 F.2d 121 (C.A. 8); Act of February 14, 1913, 37 Stat. 675 (Standing Rock Reservation), *State* v. *Molash*, 199 N.W.2d 591 (Sup. Ct. S.D.).

Indian country has been before the courts many times and has been addressed by Congress in defining Indian country in 18 U.S.C. 1151, pp. 4-5, *supra*. Both before and after the enactment of 18 U.S.C. 1151, this Court has consistently held that neither allotment nor sale of land within a reservation terminates the reservation.

In *United States* v. *Celestine*, 215 U.S. 278, the Court had to decide whether various patents of land made within a reservation precluded federal jurisdiction over a murder that might have occurred on patented land. The Court held (*id.* at 284):

> That the offense was committed within the limits of the Tulalip Indian Reservation is distinctly charged in the indictment and not challenged in the plea in bar. Although the defendant had received a patent for the land within that reservation, and although the murdered woman was the owner of another tract within such limits, also patented, both tracts remained within the reservation until Congress excluded them therefrom.

The general principles stated by the Court was that "* * * when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Id.* at 285. The Court held that the patenting of allotments on the reservation to individual Indians did not constitute such separation and did not terminate the reservation.

Several years later in *United States* v. *Nice*, 241 U.S. 591, the Court was called upon to interpret the Act of March 2, 1889, 25 Stat. 888, which, similarly to the Act at issue here, required allotments to be made within various Sioux reservations in accordance with the General Allotment Act and which authorized the Secretary of the Interior, with the consent of the tribe, to sell surplus land after the allotments had been made. The Court held that this Act did not terminate the reservation, since both the

General Allotment Act and the Act in question "disclosed that the tribal relation, while ultimately to be broken up, was not to be dissolved by the making or taking of allotments, and subsequent legislation shows repeated instances in which the tribal relations of Indians having allotments under the Act was recognized during the trust period as still continuing." 241 U.S. at 596-597. See also *Wilbur* v. *United States*, 281 U.S. 206.

This Court's more recent decision in *Seymour* v. *Superintendent*, 368 U.S. 351, is, in our view, controlling here. The 1906 Act in question in *Seymour*, 34 Stat. 80, was identical in effect to the Act in question here. That Act (1) provided for allotments to Indians under the provisions of the General Allotment Act (Sec. 2); (2) required that surplus land be made available for homesteading (Sec. 3); (3) required that surplus land not settled by homestead be sold at auction (*ibid.*); and (4) provided that the proceeds received from homesteading and sale be used for the benefit of the Indians remaining on the reservation (Sec. 6). In holding that the Act did not terminate the reservation there at issue, the Court emphasized the absence from the Act of language abolishing the reservation or "restoring that land to the public domain" (368 U.S. at 355) and the Act's requirement that the proceeds of sales of the land be used for the benefit of the Indians (*id.* at 355-356). The Court also relied on the subsequent interpretation of the Act by the Department of the Interior (*id.* at 357) and the subsequent congressional restoration to the tribe of undisposed of lands within the reservation (*id.* at 356).[19] All of these factors, which were con-

[19] The Court in *Seymour* also rejected the State's alternative contention that the reservation, if not totally abolished, had at least been diminished to the extent of actual purchases of lands within it by non-Indians. The Court held this contention inconsistent with the definition of Indian country in 18 U.S.C. 1151 as including " 'all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent * * *.' " 368 U.S. at 357-358.

trolling in *Seymour*, are also present, and equally controlling, here.

2. We note also that no mention is made in the Act of June 17, 1892, of depriving the Indians of the Hoopa Valley Reservation Extension of either their ownership of the river bed or their fishing rights.[20]

In *Donnelly* v. *United States*, 228 U.S. 243, 259, this Court held that the river bed was part of that Reservation and emphasized the importance of fishing to Indian life as follows:

> Does the reservation include the bed of the Klamath River? The descriptive words of the order are "a tract of country one mile in width on each side of the Klamath River and extending," etc. It seems to us clear that if the United States was the owner of the river bed,[21] a reasonable construction of *this language requires that the river be considered as included within the reservation.* Indeed, in view of all the circumstances, it would be absurd to treat the order as intended to include the uplands to the width of one mile on each side of the river, and at the same time exclude the river. *As a mater of history it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing.* The reports of the local Indian agents and superintendents to the Commissioners of Indian Affairs abound in references to fishing as their principal subsistence, and the river is described

---

[20] After extensive hearings in 1964 the Senate let die in committee two proposals to terminate Indian fishing rights on the West Coast, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, on S. J. Res. 170 and S. J. Res. 171, 88th Cong., 2d Sess. And Congress in 18 U.S.C. 1162(b) (p. 5, *supra*) in granting criminal and civil jurisdiction over Indian country to certain States specifically excepted federally protected fishing rights.

[21] The Court held that it was. *Id.* at 264.

> as running in a narrow canyon through a broken country, the Indians as dwelling in small villages close to its banks. [Emphasis added.]

See also *Metlakatla Indians* v. *Egan*, 369 U.S. 45; *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620.

The obvious intent of specifically including the riverbed and shore in the Hoopa Extension (Executive Order of October 16, 1891) was to protect the right of the Indians to fish. Nothing in the Act of 1892 purported to terminate the Tribes' ownership of the riverbed or their fishing rights. An intent to take such rights without compensation merely by implication should not be presumed. *Menominee Tribe* v. *United States*, 391 U.S. 404. See also *Kennerly* v. *District Court of Montana*, 400 U.S. 423.

CONCLUSION

The judgment of the California Court of Appeal should be reversed and the case should be remanded for determination of the issues not reached by the courts below.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

HARRY R. SACHSE,
Assistant to the Solicitor General.

CARL STRASS,
GLEN R. GOODSELL,
Attorneys.

MARCH 1973.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1148

IN THE MATTER OF THE APPLICATION OF
CHERYL SPIDER DECOTEAU, PETITIONER

v.

THE DISTRICT COURT FOR THE
TENTH JUDICIAL DISTRICT

On Writ of Certiorari to the
Supreme Court of South Dakota

No. 73-1500

DON R. ERICKSON, WARDEN, SOUTH DAKOTA
STATE PENITENTIARY, PETITIONER

v.

JOHN LEE FEATHER, ET AL.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

QUESTION PRESENTED

Whether the Act of March 3, 1891, opening land within the Lake Traverse Indian Reservation to non-Indian settlement, granted the State of South Dakota criminal and domestic relations jurisdiction over members of the Sisseton,Wahpeton Sioux Tribe with respect to acts done on such land patented to non-Indians.[1]

TREATY AND STATUTE INVOLVED

The Treaty of February 19, 1867, 15 Stat. 505, is set forth in the Brief for Petitioner in *DeCoteau* at App. 1-6.

The pertinent provisions of the Act of March 3, 1891, 26 Stat. 989, are set forth in the Brief for Petitioner in *DeCoteau* at App. 7-15.

STATEMENT

This brief supplements the memorandum submitted in response to the Court's order of April 29, 1974, inviting the Solicitor General to express the views of the United States in *DeCoteau* v. *The District County Court*, and expresses the views of the United States in the closely related case of *Erickson* v. *Feather*, *certiorari* was granted in both cases on June 3, 1974.

1. DeCoteau v. District County Court (No. 73-1148)

In December 1971, the State of South Dakota brought dependency and neglect proceedings in the District Court

---

[1] It is common ground that, since South Dakota is not a "Public Law 280 State" by original designation or subsequent election (see Act of August 15, 1953, 67 Stat. 588: 18 U.S.C. 1162; 28 U.S.C. 1360), the State lacks civil and criminal jurisdiction over Indians within the boundaries of a subsisting reservation, regardless of whether the acts occurred on Indian trust lands or lands patented to non-Indians. See 18 U.S.C. 1151. Accordingly, the question presented might be more simply stated as: Whether the boundaries of the Lake Traverse Indian Reservation remain as originally established by the Treaty of 1867.

for the Tenth Judicial District of South Dakota against petitioner DeCoteau, an enrolled member of the Sisseton-Whapeton Sioux Tribe, seeking to terminate her parental authority over her minor children, Robert Lee Feather and Herbert John Spider, also enrolled members of the Tribe. The parties stipulated that all of the facts giving rise to the court's order occurred within the boundaries of the Lake Traverse Reservation, as established under the Treaty of February 19, 1867, *supra,* approximately half on allotted Indian land, and the other half on land patented to non-Indians (Decoteau, Pet. App. A. 2a; Pet. App. B, 9a). Both children were placed in foster homes by the county court.

On August 4, 1972, Mrs. DeCoteau moved in the county court for dismissal of the proceedings and return of her children to her on the ground that all the incidents giving rise to the proceedings involved Indians and occurred on the Reservation and that the court therefore lacked jurisdiction. The county court denied the motion.

Mrs. DeCoteau then petitioned in the South Dakota Circuit Court for the Fifth Judicial Circuit for a writ of habeas corpus. That court denied the writ (DeCoteau, Pet. App. B). While it found that Mrs. DeCoteau and the two children are enrolled members of the Sisseton-Wahpeton Sioux Tribe (DeCoteau, Pet. App. B, 8a), it ruled that the county court had jurisdiction to entertain the dependency and neglect proceedings because some of the alleged incidents occurred on non-Indian owned land within the original boundaries of the Reservation, and, in the court's view, "the non-Indian patented land * * * is not within the Indian Country" (DeCoteau, Pet. App. B, 10a).

The Supreme Court of the State of South Dakota affirmed (DeCoteau, Pet. App. A). It held that the effect of the agreement between the United States and the Tribe dated December 12, 1889, and the Act of March 3,

1891, 26 Stat. 989, 1036, ratifying that agreement, was to separate from the Reservation all lands not allotted to Indians, and, because some of the incidents occurred on such land, the State courts had jurisdiction over the family relationships at issue.

2. Erickson v. Feather, et al. (No. 73-1500)

The ten respondents in this case are all enrolled members of the Sisseton-Wahpeton Indian Tribe. They were all tried and convicted in the courts of South Dakota for alleged crimes committed within the Treaty boundaries of the Lake Traverse Reservation, but not upon trust land. At the time this suit was instituted they were incarcerated in the South Dakota State Penitentiary (Erickson, Pet. App. A, 3a). They petitioned in the United States district court in South Dakota for writs of habeas corpus on the ground that the State of South Dakota did not have jurisdiction to try, convict, and sentence them because their alleged criminal acts took place within the boundaries of the Lake Traverse Reservation (Erickson, Pet. 2). The district court, on stipulation that "the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land * * *," denied the writs (Erickson, Pet. App. B, 10a-19a).

The Court of Appeals for the Eighth Circuit reversed (Erickson, Pet. App. A, 7a-9a). After reviewing the decisions of this Court, and its prior decisions on the effect of opening reservations to non-Indian settlement, the court stated (*id.* at 6a):

> The case before us is not unlike *Seymour* [v. *Superintendent*, 368 U.S. 351] *Mattz* [v. *Arnett*, 412 U.S. 481] and *Condon* [*United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (C.A. 8)]. The overall climate of legislative activity concerning Indian reservations during the period from 1887 through 1910 received its primary impetus from the

> General Allotment Act. See *Cohen, supra* at 78-80, (§§ 11-13). The 1891 Act, by its express terms, refers to the General Allotment Act of 1887. Just as in the beforementioned three cases, the reservation here was not sold to the government outright but merely opened for settlement under the homestead laws and the 1887 general allotment plan. Allotment and homesteading do not suggest congressional purpose to terminate the reservation. *Seymour, supra.*

The Court found no evidence in the 1891 Act's legislative history of a congressional intent to do other than open the Reservation for non-Indian settlement (Erickson, Pet. App. A, 8a), and noted that the State Supreme Court had recently denied state jurisdiction in a similar situation in *State* v. *Molash*, 199 N.W. 2d 591. The court of appeals concluded that the boundaries of the Lake Traverse Reservation remain as established by treaty and the State of South Dakota had no jurisdiction to try the respondents (Erickson, Pet. App. A, 8a-9a).

3. The Reservation and the Tribe

The Sisseton and Wahpeton Sioux were a portion of the Sioux Nation who, in the Sioux outbreaks of 1862, did not rebel against the United States. Some "freely perilled their lives during that outbreak to rescue the residents of the Sioux reservation, and to obtain possession of white women and children made captives by the hostile bands." Others fled, "fearing the indiscriminate vengeance of the whites" (Treaty of February 19, 1867; DeCoteau, Pet. Br. App. 1).

In 1867 the United States made a treaty with the Sisseton-Wahpeton Tribes in which the Tribes "cede[d] to the United States the right to construct wagon-roads, railroads * * * and other such public improvements * * * across the lands claimed by said bands (including their

reservation as hereinafter designated) * * * " (*id.* at 2; Art. 2). In consideration for the cessions made and services rendered by the Tribes, the United States established for these Tribes "as a permanent reservation" a triangular tract of land that became known as the Lake Traverse Reservation (*id.* at 3; Art. 3).[2] The Treaty further provided (*id.* at 6; Art. 10):

> The chiefs and head-men located upon either of the reservations[3] set apart for said bands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians, as may be prescribed by the Interior Department: *Provided*, That all rules, regulations, or laws adopted or amended by the chiefs and head-men on either reservation shall receive the sanction of the agent.

On December 12, 1889 the Sisseton-Wahpeton Sioux entered into an agreement with the United States providing that, in accordance with the Act of February 8, 1887 (the General Allotment Act, 24 Stat. 388), the Tribes do (DeCoteau, Pet. Br. App. 8):

---

[2] In connection with our brief *amicus curiae* in *Antoine* v. *The State of Washington*, No. 73-717, this Term, we lodged with the Clerk copies of the U.S. Department of the Interior, Bureau of Indian Affairs Map, "Indian Lands and Related Facilities as of 1971." That map shows the Lake Traverse Reservation at issue here. We are supplying copies of the map to counsel herein. We have also appended to this brief a diagram sowing the location of trust and tribal lands within the Reservation. This diagram is taken from a more detailed but bulky map prepared by the Bureau of Indian Affairs which we are lodging with the Clerk.

[3] Article 4 of the Treaty also established the Devil's Lake Reservation in North Dakota.

> * * * hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservaiton set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made.

The agreement also provides that, in addition to certain settlements of past claims and indemnities, the Indians shall receive $2.50 for each acre of land conveyed, to be deposited in the Treasury and used "for the education and civilization of the said bands of Indians * * * as provided in section five [of the General Allotment Act of 1887] * * *") *id.* at 9).[4]

The ratifying Act of March 3, 1891, after reciting the Agreement in full, provides, among other things, that the land ceded by the Indians shall be—

> subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located * * *. [*id.* at 15.]

In accordance with the Act of 1891 a large amount of land within the Reservation was patented to non-Indians. A large amount also remains Indian trust land. The State Circuit Court in *DeCoteau* found as a fact (DeCoteau, Pet. App. B, 9a, finding IX):

> That lots or tracts of non-Indian patented or deeded land and lots or tracts of unpatented Indian trust land are interspersed in a crazy-quilt pattern

---

[4] The Agreement provided that the money was to earn interest at 3% and be available for appropriation by Congress. The 1891 Act raised the interest rate to 5% and authorized the President, without further congressional action, to use any part of the funds for the "education and civilization" of the Tribe (*id.* at 14).

over the entire area within the boundaries of the Lake Traverse Indian Reservation as established by the treaty of February 19, 1867.

The Sisseton-Wahpeton Sioux Tribe has remeained a major Indian Tribe. Its present enrolled membership is 6,010, of whom 3,200 live on or near the Lake Traverse Reservation. The Tribe has a Constitution and by-laws approved by the Secretary of the Interior. In addition to having an active tribal government, it operates, with federal assistance, its own police force (presently 14 persons) and maintains a tribal court with two judges and various other personnel.[5]

It is the position of the United States, in accord with the decision of the Eighth Circuit in *Erickson*, that the Act of March 3, 1891, did not disestablish the Lake Traverse Indian Reservation and that the State of South Dakota is without jurisdiction over the domestic affairs or alleged criminal acts of Indians arising within the boundaries of the Reservation as established by the Treaty of February 19, 1867.

SUMMARY OF ARGUMENT

The essential question presented by these cases is whether the Act of March 3, 1891, by which unallotted land within the Lake Traverse Reservation was opened for settlement by nón-Indians, removed that land from the Reservation. In approaching the question it is important to bear in mind that an Indian reservation does not connote total Indian or federal ownership of the land within it. It refers to a geographical area within which the legislative authority of the Tribe functions and the area within which federal rather than state criminal jurisdiction applies in matters affecting Indians.

The 1891 Act did not specifically change the boundaries of the Reservation or return land to the public

---

[5] Information supplied by the Sisseton-Wahpeton Agency of the Bureau of Indian Affairs.

domain, and its repeated references to the General Allotment Act show that Congress intended no more than to "open" the Reservation for non-Indian settlement. This Court's decisions in *Seymour* v. *Superintendent*, 368 U.S. 351, and *Mattz* v. *Arnet*, 412 U.S. 481, show that this limited purpose is consistent only within preservation of the Reservation as a jurisdictional unit. The special provisions of the Act as to the 16th and 36th sections also show that Congress did not regard the opening of the Reservation as altering its boundaries.

Subsequent administrative and legislative actions confirm that the 1891 Act did not disestablish the boundaries of the Reservation. The President, in proclaiming the availability of lands for settlement after passage of the Act, described them as "land embraced in said reservation" and "lands within the Lake Traverse Reservation opened to settlement" (*infra*, p. 22). And the Department of the Interior has held the boundaries of the Reservation to be unaffected by the 1891 Act. Recently Congress has authorized the Secretary of the Interior to purchase lands "within the boundaries of the Lake Traverse Reservation" for the use of the Tribe and has restored to the Tribe certain federal lands within the Reservation. These acts strongly affirm the continued existence of the Reservation as a unit of federal and Indian jurisdiction.

Moreover, given the scattering of trust lands throughout the Reservation, the State's position would be destructive of law and order on the Reservation. Since the State here (being a non-Public Law 280 State) can assert no jurisdiction over Indians on trust lands, federal and trival jurisdiction over Indians everywhere within the Reservation's treaty boundaries is required for effective law enforcement.

Similarly, the Tribes' civil jurisdiction over the Reservation Indians, a basic part of tribal self-government, should not depend on the title to the lot within the Reservation where a particular act takes place. There is no

reason to believe that Congress intended so to impede the Tribe's right to govern its own people. Accordingly, the judgment of the Eighth Circuit in *Erickson* should be affirmed, and the judgment of the Supreme Court of South Dakota in *DeCoteau* should be reversed.

ARGUMENT

I

THE ACT OF MARCH 3, 1891, DID NOT ALTER THE BOUNDARIES OF THE RESERVATION AS ESTABLISHED IN THE TREATY OF FEBRUARY 19, 1867

Article 3 of the Treaty of February 19, 1867 (DeCoteau, Pet. Br. App. 3), granted the Sisseton and Wahpeton Sioux Indians a permanent Reservation with definite boundaries. Article 10 of that treaty (*id* at 6) granted the Tribes within the Reservation the right to make their own laws and be governed by them, subject to the supervision of the United States. The basic question in this case is whether the Act of March 3, 1891, which clearly permitted non-Indian settlement within the Reservation, also altered the boundaries of the Reservation. In considering that issue we must remember that an Indian reservation does not connote total Indian or federal ownership of the land within it. It refers to a geographical area within which the legislative authority of a tribe functions. *Worcester* v. *Georgia*, 6 Pet. 515; *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164. It also describes the area within which federal criminal jurisdiction in matters affecting Indian applies, 18 U.S.C. 1151, and the area within which services of the Bureau of Indian Affairs are primarily directed, *Morton* v. *Ruiz*, 415 U.S. 199. Accordingly, the fact that portions of the land within the Reservation are owned by non-Indians is immaterial. The controlling question is whether Congress deliberately terminated or changed the boundaries of the Reservation by the Act of 1891.

1. The General Scheme of the 1891 Act Suggests No Change in the Reservation's Boundaries

The 1891 Act begins by ratifying and quoting in full the 1889 Agreement made between the Tribe and the United States. The Agreement, in its preamble, twice states that it is made under the authority of the Act of February 8, 1887, the General Allotment Act, and quotes from that Act the language which authorizes the President, after allotments have been made, to negotiate with Indian tribes for the sale of their unallotted lands (*DeCoteau*, Pet. App. C, 13a). The Agreement then specifically provides for the sale of the unallotted land of this Tribe *"within the limits of the reservation"* (*id.* at 14a; emphasis added), and directs that the payment shall be deposited in the Treasury to be appropriated by Congress for the "education and civilzation" of the Indians (*ibid.*). The Act of 1891 added to the agreement a further reference to the General Allotment Act (*id.* at 19a, sec. 29) and the proviso that the lands ceded shall:

> be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located. [*Id.* at 20a.] [6]

---

[6] The background of the negotiation of the 1889 Agreement and the enactment of the 1891 Act are exhaustively set out in the brief of respondent. In our view, essentially two points are established: first, the non-Indian inhabitants of South Dakota intensely desired the opening of the Lake Traverse Reservation for settlement by non-Indians (see DeCoteau, Resp. Br., 16); second, the Tribe, which had endured four years of drought, was badly in need of money. See E. Ex. Doc. No. 66, 51st Cong., 1st Sess., p. 19. Neither of these facts, however, in any way implies that the boundaries of the Reservation had to be or were reduced. Indeed, the only money immediately paid to the Tribe was not part of the consideration for the lands "ceded" but about $500,000 conceded to be due for scout services and a cancelled annuity. For the

Several things are immediately apparent. The negotiation with the Indians, the allotments to them, and the cession made by them are expressly made under the authority of the General Allotment Act. The boundaries of the Reservation are not expressly altered and no separately described portion of the Reservation is vacated, returned to the public domain, or set aside for settlement. The government is not free to use the opened land for any purpose, but only for homesteading, townsites and school land. The tribal relationship is expressly continued and monies from the sale of the land are not distributed but are kept in trust to be appropriated by Congress or applied by order of the President for the "education and civilization" of the "bands of Indians or members thereof" (*id.* at 19a). Thus, on the face of the statute, it does not appear that Congress intended to change the boundaries of the Lake Traverse Reservation.

2. The References to the General Allotment Act Show the Reservation Was Maintained

Both the 1889 Agreement and 1891 Act were adopted pursuant to the General Allotment Act of 1887. The philosophy of the latter Act was succinctly stated in *Mattz* v. *Arnett*, 412 U.S. 481, 496:

> [The General Allotment Act] permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing.

It was not the purpose of the General Allotment Act to divide reservations into a scattering of land under federal jurisdiction and a scattering under state jurisdiction.

---

future, the Indians expected to have expended on their behalf the interest on the amount nominally deposited in the Treasury in "payment" for the land, approximately $80,000 annually (when the interest rate was raised to 5%).

Seymour v. *Superintendent*, 368 U.S. 351, 357-358. Rather, as this Court stated in *Mattz, supra*, 412 U.S. at 497, quoting from *Seymour, supra*:

> "The Act did no more [in this respect] than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards."

Nor was it the intent of the General Allotment Act to disturb tribal relations prior to the time that the trust status of allotments should be abolished. In *United States* v. *Nice*, 241 U.S. 591, 596-597, the Court stated:

> [The General Allotment Act] disclosed that the tribal relation, while ultimately to be broken up, was not to be dissolved by the making or taking of allotments, and subsequent legislation shows repeated instances in which the tribal relation of Indians having allotments under the act was recognized during the trust period as still continuing.

In sum, while the General Allotment Act of 1887 provided for some settlement of non-Indians within reservations, the congressional intent was to continue the reservation system and to maintain established relations with the Tribes and federal trust responsibility over the reservations until these protections were no longer necessary. The 1889 Agreement and 1891 Act were adopted in conformity with this policy and should not be held to have tacitly abolished or diminished the Reservation here in question.

3. The Absence of Language in the 1891 Act Expressly Altering the Boundaries of the Reservation or Returning Land to the Public Domain Shows That the Reservation Boundaries Were Not Altered

In *Mattz* v. *Arnett, supra,* this Court stated (412 U.S. at 504-505; footnote omitted):

> Congress [in 1892] was fully aware of the means by which termination could be effected. * * * The Court stated in *United States* v. *Celestine*, 215 U.S., at 285, that "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." A congressional determination to terminate must be expressed on the fact of the Act or be clear from the surrounding circumstances and legislative history. See *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *United States* v. *Nice*, 241 U.S. 591 (1916).

In a footnote, the Court gave the following examples of termination language [*Mattz, supra,* 412 U.S. at 504, n. 22]:

1. 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued").
2. 27 Stat. 63 (1892) (* * * the North Half of the Coleville Indian Reservation] "the same being a portion of the Colville Indian Reservation * * * be, and is hereby vacated and restored to the public domain").
3. 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same hereby abolished").

There is no such language in the 1891 Act at issue here. The Reservation is not discontinued. A discrete portion of it is not "vacated and restored to the public domain." The reservation lines are not abolished.

Moreover, to read into the language opening unallotted lands for settlement an intent to remove them from the Reservation would inevitably create a reservation with crazy quilt boundaries, a result that both Congress (see 18 U.S.C. 1151) and this Court have reasonably sought to avoid.

4. The Use of the Word "Cede" and the Payment Arrangement of the Act Did Not Change the Reservation Boundaries

a. The State argues that the provisions "ceding" the unallotted portion of the Reservation to the United States tacitly removes that land from the Reservation.

There are several reasons why this is not so. First the "cession" is not an outright return of the land to the public domain but a transfer expressly for the limited purpose of opening the land for homesteading in accordance with the General Allotment Act. Thus, though the Indians in the "cession" expressed their willingness that the government dispose of unallotted land, the government remained under a trust responsibility to dispose of it in a certain way, assumed to be in the Indians' interest as well as that of the government.

That a "cession" of unallotted land within a reservation does not of itself disestablish the reservation is supported by this Court's decision in *Ash Sheep Co.* v. *United States*, 252 U.S. 159. The question was whether the defendant had grazed its sheep on public land, which was entirely legal, or on "land belonging to any Indian or Indian tribe" in violation of R.S. 2117. The lands involved were (252 U.S. at 164):

> within the part of the Reservation as to which the Indians, in terms "ceded, granted, and relinquished" to the United States all of their "right, title and interest."

Nevertheless, the Court held that the lands remained in Indian ownership until actually sold to homesteaders be-

cause the lands were ceded to the United States only for subsequent sale (except for the 16th and 36th sections) and on conditions set forth in the Act. While, in our case, jurisdiction rather than ownership is at issue, *Ash Sheep Co.* at least indicates that the use of the word "cede" does not always imply a termination of the Indian-federal relationship as to the land "ceded".

b. The State, however, argues (see DeCoteau, Resp. Br. 59-65) that because the Tribe was paid a "sum-certain" for the unallotted land, with the government recouping its money as the lands were sold, rather than being paid as the lands were sold to homesteaders, the conveyance to the government should be held to have removed the lands from the Reservation. We see no reason so to conclude.

The payment, realistically, was no more immediately available to the Tribe than if it had been paid only as each tract was sold. The monies stipulated as payment for the lands ceded were to be deposited in the United States Treasury, and the expectation was that only the interest on this trust fund would be expended, and then only as found necessary for the benefit of the Tribe by the President or Congress. As Congressman Call explained:

> * * * The amount is reimbursed, so that it is but a nominal appropriation. The entire amount come back into the Treasury. It is nothing but a loan of the public credit of the United States to the accomplishment of these purposes [of the General Allotment Act] and in no respect touches the taxation upon the people of this country.
>
> Mr. President, there has been a great deal of objection found to this bill which has no just foundation. All the legislation to the bill is but the application of the existing law on the subject. [22 Cong. Rec. 3881, reprinted in DeCoteau, Resp. Br. 65].

Consequently, payment in this manner is not a reliable indication of an intent by Congress to change the boundaries of a reservation. Where the references to allotment and opening under the General Allotment Act are as specific as they are here and where, as here, there is no language even arguably disestablishing a discrete part of the Reservation, the payment scheme does not indicate disestablishment anymore than would a scheme of payment as individual lots are sold to homesteaders. In either situation, the conveyance of the unallotted lands is handled by the government for the benefit of the Tribe in accordance with the General Allotment Act without thereby terminating the Reservation. Compare *Seymour* v. *Superintendent, supra*, 368 U.S. at 354-359.

5. The Provision of the 1891 Act Referring to the "Laws of the State Wherein Located" Did Not Disestablish All or Part of the Reservation

The Act of 1891 provides that the land ceded shall "be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located * * *" (Decoteau, Pet. Br. App. 15). The Supreme Court of South Dakota, in *DeCoteau*, interpreted the final phase of this passage as expressly subjecting activities on all lands sold to state civil and criminal jurisdiction (DeCoteau, Pet. App. A, 5a-7a). The Eighth Circuit in *Erickson* found the language ambiguous—both as to its general meaning and as to whether it applied only to the school sections (which the court considered more plausible) or to all land sold. It concluded that "[W]e do not read this clause as a clear indication of congressional intention to terminate the Lake Traverse Reservation" (Erickson, Pet. App. A, 6a-7a). In our view, the "laws of the state" language is simply not addressed to the question of whose law shall govern acts committed on the land in question; the purpose is, rather, to make clear that, while the un-

allotted land shall be open only to settlement under the federal homestead and townsite laws, an exception is made for the 16th and 36th sections which are to be used only for common school purposes and may be used or sold as permitted by state law for that purpose.

The language was necessary because the South Dakota Enabling Act did not reserve the 16th and 36th sections in Indian reservations for school purposes, and special language was needed to accomplish that purpose. See the Statement of Senator Gamble at 35 Cong. Rec. 3187 and the Statement of Congressman Burke at 38 Cong. Rec. 1423, both reproduced at DeCoteau, Resp. Br. 136-138. Indeed, if the "ceded" land had been regarded by Congress as no longer forming part of the Reservation, no such special language would have been needed to establish the 16th and 36th sections as school land.[7]

In sum, while the Act of March 3, 1891 paved the way for homesteading by non-Indians within the Lake Traverse Reservation, it did not change the boundaries of the Reservation or abolish it. Thus questions of criminal and civil jurisdiction within this Reservation are determined as within any other Reservation.

II

SUBSEQUENT ADMINISTRATIVE AND LEGISLATIVE ACTIONS CONFIRM THAT THE 1891 ACT DID NOT DISESTABLISH THE 1867 TREATY BOUNDARIES

a. The most important administrative interpretation of the 1891 Act is the contemporaneous proclamation of President Harrison opening the Reservation for settlement

---

[7] See Section 1 of the Act of March 2, 1895, 28 Stat. 899-900, 43 U.S.C. 856, which, 4 years later, provided general authorization for state selection of school lands "within the boundaries of any Indian reservation in such state" from "surplus lands * * * purchased by the United States."

(Procl. of April 11, 1892, 27 Stat. 1017, DeCoteau, Pet. Br. App. 16-20). In that Proclamation, made after enactment of the 1891 Act and after payment to the Tribes for the land "ceded," the President consistently referred to the Reservation in the present tense and the lands opened for settlement as "lands embraced in said reservation" (DeCoteau, Pet. Br. App. 18). The Proclamation further referred the reader to "the accompanying schedule, entitled "Schedule of lands *within the Lake Traverse Reservation opened to settlement* by proclamation of the President * * * " (*id.* at 19; emphasis added). This proclamation is important not only because it is a contemporaneous construction of the effect of the 1891 Act, but also because it was the basis on which non-Indian settlers purchased land, giving them fair warning that they were purchasing land within an Indian reservation.

Subsequent executive orders extending the trust period on allotments on April 16, 1914, and April 19, 1924, (Nos. 1916 and 3994, respectively) each refer to the 'Sisseton and Wahpeton Bands of Sioux Indians of the Lake Traverse Reservation, North and South Dakota." And in decisions and literature of the Department of the Interior after 1891 there are numerous references to land "in" or "within" the Lake Traverse Reservation. *Circular, Sisseton and Wahpeton Lands,* 14 L.D. 302; *Madella O. Wilson,* 17 L.D. 153; *Edward Parant,* 20 L.D. 53. Nothing could be clearer than the report of the Sisseton-Wahpeton Indian Agent in 1900 describing the Reservation:

> The reservation is in the northeastern part of South Dakota, occupying parts of Roberts, Day, Grant, Marshall and Codington counties and extending into Richland and Sargent counties of North Dakota. It is about 120 miles long and at the State line 42 miles wide, coming to a point near Watertown, S. Dak. * * *

> There are 1,970 [allotted] pieces of land situated from one end of the reservation to the other * * *.
>
> [Annual Report Commissioner of Indian Affairs, United States Indian Affairs Office, 385 (1900)].

See also the reference to the Annual Reports of the Commissioner of Indian Affairs in DeCoteau, Pet. Br. 42, n. 30.

Of equal importance, the exercise of trust responsibility by the United States for this Tribe, and the Tribal relationship of its members, remained intact. A decision of the Eighth Circuit in 1901, ten years after allotment and disposal of surplus land, makes this continuing relationship clear. *Farrell* v. *United States,* 110 Fed. 942. The case concerned the application of the laws against sale of liquor to Indians to a sale to one La Framboise, a person of mixed Sioux and Caucasian ancestry. While the boundaries of the Reservation were not at issue, La Framboise's membership in the Sisseton-Wahpeton Tribe was. The court noted that:

> La Framboise had received his allotment and patent, and the lands within the reservation of the Sisseton and Wahpeton bands of Sioux Indians, to which he belonged, that had not been allotted, had been opened to settlement * * *. [*Id.* at 947.]

Nevertheless, it was found that there was continuing regulation by the Tribe of its membership and family relations and constant supervision over the Tribe by the resident federal agent:

> [The issuing of allotments] did not radically change the title to the lands reserved for [these Indians], or their need of care and education. The government held the title to their reservation in trust for them collectively before, it held the title to their allotments in trust for them individually after, the issue of the patents. There was every reason why congress should retain and exercise its power to superintend

> the trade with them, and none to induce it to renounce it. By the treaty of 1867 the United States agreed to appoint and maintain an agent for these Indians at Lake Traverse, and by its legislation and the rules of the interior department it made it the duty of this agent to use every endeavor to suppress the traffic in intoxicating liquors with them, to educate them, and to induce them to cultivate the soil. There has been no express abrogation of this agreement in any subsequent treaty or act of congress, and the government has continued to comply with it since the allotments as it did before. Agreements are not released or abrogated and statutes are not repealed by implication unless the subsequent agreements or laws are necessarily repugnant to those which preceded them. [*Id.* at 951.]

This evidence of the continued exercise of federal trust responsibility after the opening of the Reservation supports our conclusion that the Reservation was opened, but not dissolved. See also *United States* v. *Rickert*, 188 U.S. 432.

We have been unable to discover contemporaneous opinions of the Department of the Interior directed precisely to the jurisdictional effect of the 1891 Act. There are, however, two recent decisions, predating either of the appellate decisions under review, and rendered at a time when *DeMarrias* v. *State*, 319 F. 2d 845 (C.A. 8), overruled by the *Erickson* decision, was still intact. Both decisions, made by the Field Solicitor of the Department of the Interior in Aberdeen, South Dakota (the office which deals with this Tribe on a regular basis), sustained the continued federal and tribal authority and the commenusurate lack of state jurisdiction over Indians within the Treaty boundaries of the Lake Traverse Reservation (Opinions of June 9, 1972 and August 16, 1972, DeCoteau, Pet. Br. App. 21-33). Interpretation of a law by the government agency responsible to administer it is,

of course, entitled to great weight. *Udall* v. *Tallman*, 380 U.S. 1, 16. This is particularly true when the statute may affect the status of an Indian reservation and the trust responsibilities of the United States. *Seymour* v. *Superintendent, supra*, 368 U.S. at 357; *Mattz* v. *Arnett, supra*, 412 U.S. at 505.[8]

b. Congress, since the opening of the Reservation, has continued to appropriate funds for the Sisseton-Wahpeton

---

[8] South Dakota points out (DeCoteau, Rep. Br. 113-116) that the depiction of the Reservation on government maps varied considerably over the years since 1891. From 1892 to 1908 the Reservation was not shown on the maps. From 1909 to 1917 the Reservation was shown as an "open" reservation, but the 1918 map shows it was a "former" reservation. Modern maps show the Reservation simply as a "reservation." We think these differences are unimportant. The early map-makers wanted to show that the lands were no longer reserved for exclusive Indian occupancy, but were open for settlement. As this Court and Congress began to refine the jurisdictional meaning of such openings the map makers followed suit. Indeed the meaning of the word "reservation" itself has changed over the years. In early years it seemed to have been used to mean literally land reserved for exclusive Indian use. Later, as a result of the various "opening" Acts, it came to have the broader jurisdictional meaning that it has today. The first decision of this Court to clarify the meanings of "reservation" and "Indian country" after the General Allotment Act was *United States* v. *Celestine*, 215 U.S. 278, 285-286. This process of clarification continued with enactment of 18 U.S.C. 1151 and this Court's subsequent decision in *Seymour* v. *Superintendent, supra*. Thus, as with early maps, early casual references to the Reservation as the "former reservation" (see DeCoteau, Br. 9) are of little significance; they indicate only that the Reservation had been opened for non-Indian settlement, which is not disputed. South Dakota also points out a reference to the "former Sisseton Indian Reservation" in *United States* v. *Rickert, supra*, 188 U.S. at 432 (see DeCoteau, Resp. Br. 173). That phrase, however, is not the Court's but part of a question from the pleadings below as recited in the question certified to the Court. Reservation bundaries were not at issue and the use of the phrase must be considered in light of its limited meaning at the time.

Reservation or Agency[9] and has never referred to the Reservation as a "former reservation" as it did with the reservations recognized by this Court as continuing to exist in *Seymour* v. *Superintendent, supra,* 368 U.S. at 356, n. 12, and *Mattz* v. *Arnett, supra,* 412 U.S. at 496, n. 17. This consistent appropriation process is a significant exercise of trust responsibility. Recently, moreover, Congress has unmistakenly reaffirmed its view that the opening of the surplus lands to non-Indian settlement did not terminate or diminish the Reservation (Public Law 93-489 and Public Law 93-491, signed by the President October 26, 1974). Indeed, in Public Law 93-489 Congress restored to "the United States in trust for the Sisseton-Wahpeton Sioux Tribe" certain federally owned land "of the Lake Traverse Indian Reservation in North and South Dakota." Since the land had not been trust land, this is a clear indication of the congressional understanding that the Reservation was never abolished and always included non-trust land. Similarly, Public Law 93-491 authorizes the Secretary of the Interior to acquire lands:

> *within the boundaries of the Lake Traverse Reservation* * * * for the purpose of consolidating landholdings, eliminating fractional heirship interests in Indian trust lands, providing land for any tribal program for the improvement of the economy of the tribe and its members through the development of industry, recreational facilities, housing projects, and the general rehabilitation and enhancement of the total resource potential *of the reservation.* [Emphasis added.]

---

[9] See, for typical early appropriation language, 39 Stat. 988 and 42 Stat. 576. In recent years general appropriations have not been by particular reservation or agency. An extensive accounting of trust funds of the Tribe expended by the United States is available in General Services Administration Report, *The Lower Sioux Indian Community in Minnesota, et al.*, Docket No. 363 (June 1967) before the Indian Claims Commission.

It further authorizes the Tribe to sell tribal property and, from the proceeds, purchase *"other land on the reservation."* Again, we have a recognition of the Reservation's existence beyond trust lands and its continued service as the home and political jurisdiction of the Sisseton-Wahpeton Tribe. While these recent Acts are not determinative of an earlier congressional intent, they are consistent only with the continuity of the Reservation's original boundaries and should be given weight. See *Seymour* v. *Superintendent, supra,* 368 U.S. at 356.

III

THE TRIBE'S INHERENT RIGHT OF SELF-GOVERMENT, CONFIRMED IN THE TREATY OF FEBRUARY 19, 1867, AND THE PRACTICALITIES OF PERFORMING THE CONTINUING TRUST RESPONSIBILITIES OF THE UNITED STATES TOWARD THE TRIBE SUPPORT THE INTERPRETATION OF THE ACT OF 1891 AS NOT DIMINISHING THE RESERVATION

We have discussed the jurisdiction of the State within the borders of the Lake Traverse Reservation primarily in terms of the precise wording of the statute opening the Reservation for non-Indian settlement. But the alleged ambiguity of the Act of 1891 and of similar Acts opening reservations also calls for a broader approach.

We note, first, that the Sisseton-Wahpeton Tribe remains an important and populous Indian tribe exercising its federally guaranteed powers of self-government under federal guardianship. A large amount of land, scattered about within the boundaries of the Reservation, remains trust land. The State of South Dakota did not choose to assume responsibility for civil and criminal law and law enforcement within Indian country in the state when it could have done so under Public Law 280, *supra.* Compare *Williams* v. *Lee,* 358 U.S. 217, 222-223; *Mc-*

Clanahan v. *Arizona State Tax Commission*, 411 U.S. 164, 177-178. Nor is the decision that the State asks of this Court one that could give the State jurisdiction over acts occurring on trust land. Instead, the result sought by the state would greatly increase the difficulty of achieving adequate law and order on the reservation by requiring plat-book jurisdiction—state jurisdiction over Indians on this lot, federal or tribal jurisdiction on the next. Obviously, such an absurd result, in a reservation such as this, where a large Indian population lives, ought to be avoided, if possible.

Also, and equally important, it is, and has been, the policy of the United States that, unless specifically terminated by Congress, Indian tribes are self-governing political communities. In *McClanahan* v. *Arizona State Tax Commission, supra,* 411 U.S. at 168, this Court stated:

> * * * "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789 (1945). This policy was first articulated by this Court 141 years ago when Mr. Chief Justice Marshall held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive * * *."

See also *Williams* v. *Lee, supra,* 358 U.S. at 220:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right or reservation Indians to make their own laws and be ruled by them.

This right to self-government was explicitly guaranteed the Sisseton-Wahpeton Tribe in its 1867 Treaty with the United States and has never been taken away by Congress. Article 10 of that Treaty states (DeCouteau, Pet. Br. App. 6):

> The chiefs and head-men located upon either of the reservations set apart for said brands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians * * *.

Tribal control over domestic relations, at issue in *DeCoteau*, is at the heart of this right of Tribal self-government. See, *e.g.*, *United States* v. *Quiver*, 241 U.S. 602, 603-604. The question of a child's welfare cannot be decided without reference to his family structure. This involves both a sympathetic knowledge of the individuals involved, and a knowledge of the background culture. No matter how well-intentioned, state authorities are not likely to have insight into these important areas. Moreover, if such authorities are to have jurisdiction over tribal children in dependency and neglect cases, there is a substantial chance that such children may be placed in non-Indian homes outside the Reservation and be deprived of their cultural identity.[10] The Sisseton-Wahpeton Tribe opposed such practices in a tribal resolution on July 6, 1972, which states:

---

[10] This concern, in the light of present experience, was strongly expressed by the North American Indian Women's Association in a recent report. North American Indian Women's Association, Inc., *Project Report for Development of a Prototype Program for Indian Children with Special Needs*, BIA Contract No. K51C14200761, December 15, 1973. The first recommendation made by the study was that "[W]hen at all possible, Indian Children should be placed with Indian foster parents." *Id.* at 62.

SISSETON-WAHPETON SIOUX

WHEREAS, The Sisseton-Wahpeton Sioux Tribe is interested in the well-being of all the enrolled members of the tribe and

WHEREAS, Minor children of Sisseton-Wahpeton descent have been placed in non-Indian foster and adoptive homes all over the United States,

WHEREAS, The Tribal council is in the process of researching the sovereign status of the tribal entity in respect to its jurisdiction as stated in the constitution of the Sisseton-Wahpeton Sioux Tribe, and,

WHEREAS, It is the intent of the Sisseton-Wahpeton Sioux Tribe to establish its own method of social and economic development and well-being of the enrolled members, and,

WHEREAS, It is the strong feeling of the tribal council "to make every stand possible to keep these children on the reservation" (minutes of June 6th council meeting) and "the tribal council would like these children to be placed in an Indian licensed home until an Indian home can be found for them to be adopted."

THEREFORE, BE IT RESOLVED, that Mr. Bert Hirsch, legal counsel from the Association of American Indian Affairs, will stand on these grounds in his argument in Robert County Court on July 7, 1972 and future cases of this nature.

The Sisseton-Wahpeton Tribe is a responsible body, concerned about its young people. It should have authority over dependency and neglect and similar proceedings concerning its own people anywhere within the Reservation.[11] If this authority were fragmented so as to apply only to acts committed on trust land within the

[11] The Tribe has assumed such authority under its tribal code.

Reservation, it would be practically meaningless as an exercise of effective self-government. And neither the Tribe, in domestic relations matters and with respect to the criminal offenses left to its control, nor the United States, in its control over major crime, should have to search the tract books in order to determine whether it or the State has jurisdiction. *Seymour* v. *Superintendent, supra,* 368 U.S. at 358.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of South Dakota should be reversed and the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
HARRY R. SACHSE,
Assistants to the Solicitor General.

EDMUND B. CLARK,
EDWARD J. SHAWAKER,
Attorneys.

NOVEMBER 1974.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 75-562

ROSEBUD SIOUX TRIBE, PETITIONER

v.

HONORABLE RICHARD KNEIP, ET AL.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-61) is reported at 521 F.2d 87. The opinion of the district court (Pet. App. 63-113) is reported at 375 F.Supp. 1065.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1975 (Pet. App. 61). A petition for a writ of certiorari was filed on October 11, 1975, and was granted on May 24, 1976. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether three Acts of Congress, which authorized the sale of land within portions of the Rosebud Indian Reservation to non-Indians and directed that the proceeds of each sale as received should be deposited in trust for the benefit of the Tribe, diminished the exterior boundaries of the Reservation as they existed in 1889.

STATUTES INVOLVED

The Acts of April 23, 1904, 33 Stat. 254; March 2, 1907, 34 Stat. 1230; and May 30, 1910, 36 Stat. 448, are set forth in Appendix C to the petition.

STATEMENT

In June 1972, the Rosebud Sioux Tribe of Indians filed suit in the United States District Court for the District of South Dakota, seeking a declaratory judgment that the exterior boundaries of the Rosebud Reservation, as defined in the Act of March 2, 1889, 25 Stat. 888, had not been altered by three Acts of Congress (Act of April 23, 1904, 33 Stat. 254; Act of March 8, 1907, 34 Stat. 1230; Act of May 30, 1910, 36 Stat. 448) opening certain unallotted surplus land to non-Indian settlement.

In the Act of March 2, 1889, Congress "restored to the public domain"[2] (25 Stat. 896) one-half of the Great Sioux Reservation established in 1868, but preserved for the Sioux Tribes six Reservations in present-day North and South Dakota (*id.* at 888-890). Among these was the Rosebud Reservation, located in the south central portion of South Dakota, and composed of the Counties of Todd, Tripp and Mellette, and parts of Gregory and Lyman counties.[1]

---

[1] A map of the Reservation, showing the 1889 boundaries and the boundaries as found by the court of appeals, is reproduced at Pet. App. 113.

In 1901, the Rosebud Tribe agreed (Pet. App. 15, n. 21) to "cede * * * and convey to the United States" for a specified sum of $1,040,000 the unallotted land within the Gregory County portion of its Reservation for non-Indian settlement. Congress rejected this agreement in 1902 and 1903. The problem "was, simply put, money" (Pet. App. 16). Congress then "amended and modified" the agreement (Pet. App. 117) and enacted it as the Act of April 23, 1904 (Pet. App. 117-120). The primary amendments were that (1) the Indians were not guaranteed any consideration for the land except with respect to the 16th and 36th sections (school section), but were to be paid only as the lands were actually sold to settlers;[2] (2) the United States did not guarantee to find purchasers but agreed only to "act as trustee for said Indians to dispose of said lands" (Section 6, Pet. App. 120); and (3) limitations were placed on the distribution of the proceeds to the Indians (compare Art. III, Pet. 118, with Art. III, Pet. App. 115-116).

The Rosebud Reservation was further opened by the 1907 Act, which, as passed, provided (Pet. App. 121) "that the Secretary of the Interior * * * is hereby, authorized and directed, * * * to sell or dispose of all that portion of the Rosebud Indian Reservation * * * [within Tripp County] except such portions thereof as have been, or may hereafter be, allotted to Indians" (and except school sections that were to be paid for by the United States, and granted to the State).[3] The 1907 Act further provided (Section 5, Pet. App. 122-123) that the funds

---

[2] Section 2 of the Act (Pet. App. 119) set forth a schedule of the prices per acre for the land, which varied according to the time at which the land was sold.

[3] Each Act contains substantially identical school land provisions to the effect that Sections 16 and 36 of the lands in each township are not to be disposed of, but are reserved for donation to the State for use as common schools. These lands were to be paid for by the federal government. See Pet. App. 120, 121, 123, 127.

received should be deposited in an interest-bearing account in the Treasury of the United States "to the credit of the Indians belonging and having tribal rights on the Rosebud Reservation," that the interest shall be paid annually to the Indians, that all funds up to one million dollars should be distributed after ten years on a per capita basis to the Indians, and that the balance should be expended or distributed for the Indians' benefit at the discretion of the Secretary of the Interior. The 1907 Act concluded, as did the 1904 Act (Section 6, Pet. App. 120), with a section declaring (Section 8, Pet. App. 123):

> * * * nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the *United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided* * * *. [Emphasis added.]

The 1910 Act (Pet. App. 124-127), like the 1907 Act (Pet. App. 121), began with an authorization to the Secretary to "sell and dispose" of surplus lands within a described portion (Mellette County) of the Reservation App. 124).[4] The Act further provided (*ibid.*)

> [t]hat any Indians to whom allotments have been made on the tract to be *ceded* may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof

---

[4] The 1907 Act uses the phrases "sell *or* dispose" (emphasis added).

> on the diminished reservation * * *. [Emphasis added.]

The 1910 Act further required (Section 4, Pet. App. 125) that a commission be established, composed of "[o]ne resident citizen of the State of South Dakota, one representative of the Interior Department, and one person holding tribal relations with said tribe of Indians," to determine the price setters would be charged for the land. The proceeds of any eventual sales were to be deposited in the Treasury to the credit of the "Indians belonging and having tribal rights on the said reservation," which "shall be at all times subject to appropriation by Congress for their education, support and civilization" (Section 7, Pet. App. 126). The 1910 Act (Section 11, Pet. App. 127), like the earlier Acts (Section 6, Pet. App. 120; Section 8, *id.* at 123), explictly stated that the United States was not obligated to purchase the surplus land, except Sections 16 and 36 for school purposes, and would act only as trustee for the Indians in disposing of the surplus land.

In a lengthy opinion the district court held that each of the 1904, 1907 and 1910 Acts extinguished the portion of the Reservation to which it applied (Pet. App. 63-113; see *id.* at 113). The court found no language in the Acts expressly terminating the Reservation in the counties involved and no "express discussion of state versus federal jurisdiction over the lands in question" (*id.* at 85); however, the court held that, in light of the "surrounding legislative history and the circumstances" (*id.* at 109) from 1901 to 1910, Congress intended to extinguish the portions of the Reservation at issue.

The United States Court of Appeals for the Eighth Circuit affirmed (Pet. App. 1-61), after this Court had decided *DeCoteau* v. *District County Court*, 420 U.S. 425. The court rejected arguments of the Tribe, and the United States as *amicus curiae*, that the language of the Acts interpreted in light of prior decisions of this Court

did not abolish the disputed portions of the Reservation, and that neither the legislative nor the administrative history established that the State had undisputed jurisdiction to the exclusion of the Tribe and the United States. The court thought that prior decisions, including this Court's decisions in *Seymour* v. *Superintendent*, 368 U.S. 351, and *Mattz* v. *Arnett*, 412 U.S. 481, and its own decisions in *City of New Town, North Dakota* v. *United States*, 454 F. 2d 121, and *United States ex rel. Condon* v. *Erickson*, 478 F. 2d 684, were "of limited utility" in deciding this case (Pet. App. 5) and concluded that "the overriding judicial inquiry remains unchanged, namely, the congressional intent" (*ibid.*). Stating that this Court's decision in *DeCoteau, supra*, permitted it to utilize "all materials reasonably pertinent to the legislation * * * as well as those bearing upon the historical context of its passage, such as the social forces then at work in the area * * *" (Pet. App. 8), the court found a "continuity" of circumstances from 1901 to 1910 that demonstrated Congress' intention to extinguish Indian jurisdiction over the areas in question (*id.* at 26-28, 34, 38, 39-40, 44, 46, 48).

SUMMARY OF ARGUMENT

It is the position of the United States that the Acts of 1904, 1907, and 1910, while opening portions of the Rosebud Reservation to non-Indian settlers, did not contract the exterior boundaries of the Reservation. This position is based upon our assessment of the Acts themselves, the contemporary social and legislative history, subsequent treatment of the lands by the Department of the Interior, and doctrines developed by this Court in similar cases. While the courts below gave some attention to each of these factors, we believe that the courts overemphasized inconclusive legislative history. A more balanced analysis, we submit, requires a finding that Congress did not intend by these Acts to terminate most of the Reservation but expected that termination would occur, if at all, when the trust period on allotments expired.

This Court's decisions require compelling evidence to prove that reservation boundaries have been cut back without the consent of the affected Indian tribe and without guaranteed payment for the opened lands. Any different construction would place Indians in the position of surrendering jurisdiction over substantial portions of their reservation before any benefits had been assured or received. Thus, the Court found in *Seymour* v. *Superintendent*, 368 U.S. 351, and *Mattz* v. *Arnett*, 412 U.S. 481, that unilateral Acts of Congress, providing that the United States would not purchase Indian lands but would merely act as trustee for their sale, did not commit the opened lands to state jurisdiction. The Acts opening the Rosebud Reservation were drafted in similar fashion and are to the same effect.

The Acts of 1904, 1907, and 1910, do not demonstrate an intention to return lands to the public domain, and the clear language of other Acts expressly restoring lands to the public domain is notably absent. In contrast to public lands, which are subject to disposition under general laws, the lands of the Rosebud Reservation were to be sold only in accordance with the terms of the trust established by Congress; all proceeeds were explictly dedicated to the benefit of the Tribe. In fact, Congress included a provision granting school lands to the State in each Act, despite this Court's holding in 1902 that such provisions were unnecessary when lands were restored to the public domain. *Minnesota* v. *Hitchcock*, 185 U.S. 373.

Subsequent administrative actions confirm that the Acts did not disestablish the 1889 boundaries of the Reservation. Under the Indian Reorganization Act of 1934, 48 Stat. 984, as amended, 25 U.S.C. 461, *et seq.*, the Department of the Interior restored to Indian ownership lands in the opened portion of the Reservation, an action that could not have included lands "upon the public domain outside the geographic boundaries of any Indian

reservation * * *" (48 Stat. 986). Moreover, numerous communications and reports show that the Deparement, before and after the Indian Reorganization Act, recognized territory in the opened counties as within the Rosebud Reservation. Recent appropriations are consistent with that viewpoint.

The uncertain legislative history does not demonstrate a contrary intention. Despite the emphasis placed on the legislative history by the court of appeals, the reports and debates show that Congress at no time concerned itself with the question of jurisdiction over the opened lands. While the court of appeals stressed references made in unrelated contexts, we submit that the inferences to be drawn from such references are at best ambiguous. They do not merit the weight that they received in the court of appeals.

The Acts of 1904, 1907, and 1910, therefore, do not demonstrate congressional intent to impede the Tribe's right to govern its own people.

ARGUMENT

I. THE DECISIONS OF THIS COURT HOLD THAT ACTS OF CONGRESS ESTABLISHING TRUSTS FOR THE SALE OF INDIAN LANDS DO NOT REDUCE RESERVATION BOUNDARIES

This Court, in deciding Indian cases, does not write upon a fresh slate. The Court has long recognized that "[t]he relation of the Indian tribes living within the borders of the United States * * * [is] an anomalous one and of a complex character." *United States* v. *Kagama*, 18 U.S. 375, 381. "Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States." *Id.* at 383-384 (emphasis in original). With respect to legislation, therefore, "[d]oubtful expressions are to be resolved in favor of the weak and defenseless

people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367.

During the past fifteen years this Court has been asked three times to decide whether Congress intended to cut back reservation boundaries or to open up reservation lands for settlement with the existing boundaries unchanged. *Seymour* v. *Superintendent*, 368 U.S. 351; *Mattz* v. *Arnett*, 412 U.S. 481; *DeCoteau* v. *District County Court*, 420 U.S. 425. The principles developed by those decisions are directly applicable to the questions raised in this case.

In *Seymour*, this Court considered the effect of the Act of March 22, 1906, 34 Stat. 80, on the Colville Indian Reservation in the State of Washington. In 1892, the United States expressly vacated and restored a portion of the Reservation "to the public domain," 27 Stat. 62, 63. In the 1906, Act, however, no such language was included; the Secretary was merely directed "to sell or dispose" of unallotted lands within the Reservation (34 Stat. 80) and to place the proceeds as received from settlers into the Treasury for the benefit of the Indians (34 Stat. 81). The Act further provided that the United States would act as a trustee in disposing of these lands for the Indians' benefit and not as a purchaser (34 Stat. 82). Because *Seymour* involved a criminal matter, this Court assessed the meaning of the 1906 Act against the backdrop of the definition of "Indian Country" found in 18 U.S.C. 1151.[5]

This Court concluded that "the purpose of the 1906 Act was neither to destroy the existence of the diminished Colville Indian Reservation nor to lessen federal responsi-

---

[5] Indian country is defined, in part, as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation * * *."

bility for and jurisdiction over the Indians having tribal rights on that reservation." 368 U.S. at 356. The Colville Act "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards" (*ibid.*). The Court noted that any other conclusion would result in checkerboard jurisdiction over Indians, a consequence that Congress sought to avoid by enacting 18 U.S.C. 1151 (*id.* at 358).[6]

In *Mattz* this Court was required to decide whether the Klamath River Indian Reservation in California was terminated by an 1892 Act of Congress or remained Indian country as defined in 18 U.S.C. 1151 (412 U.S. at 483). After assessing legislative history and subsequent administration of the land by the Interior Department, the Court concluded, as it had in *Seymour*, that the mere opening of the Reservation to settlers did not mean that the Reservation was discontinued. Recognizing that "the House was generally hostile to continued reservation status of the land," the Court nonetheless found that Congress never terminated it (*id.* at 499)[7] but merely provided for

---

[6] This Court took particular note of the subsequent treatment of this area by Congress and by the Interior Department and gave particular attention to the Department's decision, 54 I.D. 559, that land within the Colville Reservation previously opened to settlement could be restored to Reservation status under the Indian Reorganization Act of 1934 (368 U.S. at 357, n. 14). This Court recognized a period of "congressional confusion" when the area was referred to as the "former Colville Reservation" (*id.* at 356, n. 12), but did not find such references indicative of a Congressional intent to terminate jurisdiction over the Reservation.

[7] The State urged that a reference in the 1892 Act to "what was [the] Klamath River Reservation," indicated a Congressional intention to terminate. This Court found the reference to the Reservation "in the past tense * * * merely * * * a natural, convenient and shorthand way of identifying the land subject to allotment * * *" (*id.* at 498). Cf. *Seymour*, *supra*, 368 U.S. at 356, n. 12.

sale of the surplus lands with the "proceeds of sales to be held in trust for the 'maintenance and education' * * * of the Indians" (*id.* at 504). Because a decision to terminate a reservation "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history" (*id.* at 505), this arrangement did not deprive the Indians of their important reservation rights.[8]

Placing the 1892 Act into the historic context of the General Allotment Act of 1887, 24 Stat. 388, the Court further observed that the Allotment Act "permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to *continue the reservation system* and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. *When all the lands had been allotted and the trust expired, the reservation could be abolished*" (412 U.S. at 496; emphasis added). See also *United States* v. *Nice*, 241 U.S. 591, 599. However, enactment of the Indian Reorganization Act in 1934, 48 Stat. 984, as amended, 25 U.S.C. 461 *et seq.*, ended the policy of allotment, and all trust periods were indefinitely extended (412 U.S. at 496, n. 18). Later, as the Court noted, portions of the land in the Klamath Reservation previously opened to settle-

---

[8] After this Court's decision in *Seymour*, the Eighth Circuit considered whether the Act of May 29, 1908, 35 Stat. 460, opening the Cheyenne River Reservation in South Dakota, diminished its boundaries. Relying on *Seymour*, it held it did not, *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (C.A. 8), and this Court in *Mattz* twice noted that decision with approval, remarking that it presented "issues not unlike those before us" (412 U.S. at 497, n. 19 and 505, n. 23). The Eighth Circuit had reached a similar conclusion in *City of New Town, North Dakota* v. *United States*, 454 F.2d 121, involving the effect of the Act of June 1, 1910, 36 Stat. 455, opening the Fort Berthold Reservation.

ment were withdrawn and restored to tribal ownership (*id.* at 496, n. 17 and 505).[9]

In *DeCoteau,* the Court determined the effect of the Act of March 3, 1891, 26 Stat. 989, 1035, on the Lake Traverse Reservation. The 1891 Act had ratified an agreement in which the Tribe expressly ceded to the United States all its "right, title and interest" in the land for a lump sum. The Court contrasted this transaction with the Acts involved in *Seymour* and *Mattz* (420 U.S. at 447-449, stating that it "adhere[d] without qualification to both the holdings and the reasoning of those decisions"; the Court, however, found that "gross differences between the facts * * *" (*id.* at 447) justified a finding that the Reservation had been terminated.

The differences identified by the Court are important to the present case. The 1891 Act was a negotiated agreement with the Tribe, whereas the Acts involved in *Seymour* and *Mattz* were "unilateral" Acts of Congress not agreed to be the Tribes (*id.* at 448). The 1891 Act was a straightforward cession for a sum certain in amount, and not the arrangement found in *Mattz* and *Seymour* where proceeds from uncertain future sales were placed in trust for the benefit of the Tribe (*id.* at 448-449). The Department of the Interior did not, as it had in *Mattz* and *Seymour,* consistently regard the Reservation as continuing (*id.* at 448). These distinctions led to the conclusion that the Lake Traverse Reservation was extinguished and the land restored to the public domain.

The fact that the Indians' land holdings would be diminished as the land was sold, therefore, does not mean that the Rosebud Reservation itself was abolished in the areas where the land subject to sale was located. In *DeCoteau* (but not in *Seymour* or *Mattz*) the United States

---

[9] The Klamath River Reservation was also identified by the Interior Department (54 I.D. 559), as containing land, opened by the 1892 Act, which could be restored to reservation status.

itself purchased the land in the Reservation pursuant to an agreement with the Indians; this, the Court held, restored the land to the public domain and extinguished the Reservation. 420 U.S. at 446-447. But under the Rosebud Acts, the federal government did not buy the Indians' land. The government acted merely as a trustee for the Tribe in selling its land to non-Indians; the land passed from the Indians to private individuals. It was not first made part of the public domain, and Congress appropriated no funds to pay for these lands, except for school sections. Rather, any funds distributed to or deposited on behalf of the Indians were to be derived from amounts paid by the non-Indian purchasers. If there were no buyers interested in the land the government was to sell for the Indians, the Indians would have received no money; yet according to the reasoning of the court below, the Tribe nevertheless would have been deprived of three-fourths of its Reservation. Such an intention should not be attributed to Congress without the clearest kind of evidence.

Every court faced with similar questions, except the courts below, has found that such Acts of Congress did not extinguish portions of the Reservations but instead opened the Reservations to allow integration of Indians and settlers and to provide needed lands for the western migration.[10] This construction is consistent not only with proper concern for Indian sovereignty but also with the long-standing reluctance to place Indian wards within the reach of state jurisdiction. "The policy of leaving Indians free from state jurisdiction and control is deeply

---

[10] *Russ* v. *Wilkens*, 410 F. Supp. 579 (N.D. Cal.); *Leech Lake Band of Chippewa Indians* v. *Herbst*, 334 F. Supp. 1001 (D. Minn.); *City of New Town, North Dakota* v. *United States*, 454 F.2d 121 (C.A. 8); *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (C.A. 8); *Putnam* v. *United States*, 248 F.2d 292 (C.A. 8); *Confederated Salish and Kootenai Tribes* v. *Namen*, 380 F. Supp. 452 (D. Mont.), affirmed, 534 F.2d 1376 (C.A. 9), pending on petition for certiorari, No. 76-185.

rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789.

Although the court of appeals found these principles "of limited utility" (Pet. App. 5), we believe they may not be so lightly dismissed.[11] While we do not read the cases to say that Congress could never remove lands from a reservation by a unilateral decision to act as trustee for their sale, that construction should be greatly disfavored. This is particularly true when, as here, Congress demonstrated quite clearly that it did not intend to place the Indian lands within the public domain.

II. THE ACTS OF 1904, 1907 AND 1910 DID NOT RESTORE INDIAN LANDS TO THE PUBLIC DOMAIN

The United States does not dispute that Congress during the early 1900's expected that Indian reservations at some point would be abolished. Congress was faced with pressures to open additional land located within existing Indian reservations and Congress itself desired that Indians gradually develop a less tribal way of life. The integration of Indians while white settlers was viewed as an important step in that development. The question in this case, therefore, is not whether Congress intended the Rosebud Reservation to continue unchanged indefinitely but whether termination was to occur immediately upon passage of the Acts or at some later time, when the trust period on allotted Indian lands had expired.

---

[11] The court of appeals apparently misunderstood (Pet. App. 24-25) the significance of the fact that Congress did not secure the approval of the Rosebud Indians as required by the Treaty of 1868 (15 Stat. 635, 639). While Congress had the power to dispose of lands without such consent, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, its decision to do so must be regarded as unilateral. In fact, the government's negotiator, Inspector James McGlaughlin, repeatedly stressed to the Indian that their lands could be sold without their consent and that they should redirect their efforts to securing a reasonable price. *E.g.*, A. 476, 481, 490, 776, 803-804.

1. The language of the Acts themselves does not disclose an intent to return land to the public domain. The 1904 Act provides for the Indians to "cede, surrender, grant and convey to the United States all their claim, right, title and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted [within Gregory County]" (Pet. App. 115), but that terminology was simply carried over from the unratified agreement for sale at a sum certain. The 1904 Act nowhere provides that the Reservation was abolished or that the lands were to be restored to the public domain. The Acts of 1907 and 1910 provide that the Secretary of the Interior shall "sell or dispose" (in the 1907 Act) or "sell and dispose" (in the 1910 Act) "of all that portion of the Rosebud Indian Reservation subsequently described (Pet. App. 121, 124). Again no mention is made that the Reservation is *pro tanto* terminated or that the lands were to become public lands. This reticence is in marked contrast to the express language used by Congress in other statutes. See 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued"); 27 Stat. 63 (1892) ("the same being a portion of the Colville Indian Reservation * * * be, and is hereby vacated and restored to the public domain"); 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby abolished"). See also *Mattz* v. *Arnett*, *supra*, 412 U.S. at 504, n. 22.[12]

---

[12] The language of the 1904 Act is similar to the statutory language discussed in *DeCoteau*, *supra*, and found sufficient to terminate the Reservation. But Congress had *ratified* a sale for a sum-certain in that case, and the words of cession in that context merely reflected the common understanding of the Indians and the government. The words in this case were originally part of a similar agreement, which Congress refused to ratify. Although Congress retained the form of the agreement in passing the 1904 Act, the language disappeared in the Act of 1907 and 1910, both of which were passed without tribal consent.

The mere fact that the government had power to sell the Indians' lands does not mean that they are public lands. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall* v. *Sanger*, 92 U.S. 761, 763. The United States commonly owns public lands free of beneficial rights and may dispose of them for its own benefit. Its power over the Rosebud Reservation lands, however, was significantly different; under the Acts of 1904, 1907, and 1910, the United States could sell the lands only under specified conditions and was required to administer the proceeds for the benefit of the Rosebud Indians. Unlike agreements providing for sale for a sum-certain, the three Acts in question specifically stated that the United States did not guarantee to buy, or even to find purchasers for, the affected lands. In fact, part of the lands was later released from the trust in accordance with the Indian Reorganization Act of 1934 (pp. 28-33, *infra;* App. A, *infra*, p. 1A).

The provision for schol lands in each of the three Acts indicates that Congress was aware of the nature of this trust. In May 1902, this Court, in *Minnesota* v. *Hitchcock*, 185 U.S. 373, had considered the troublesome question whether a cession-in-trust to the government for resale gave Minnesota the right to Sections 16 and 36 of the ceded lands for school purposes.[13] (The Enabling Act admitting Minnesota to the Union, like the Enabling Act of South Dakota, provided that the State was en-

[13] Congress was well aware of the importance of *Minnesota* v. *Hitchcock*. After the Department of the Interior moved to dismiss the State's original action in this Court, on the ground that the Chippewa Indians were indispensable parties, Congress passed an Act expressly permitting the Interior Department to appear instead of the tribe in such cases. Act of March 2, 1901, 31 Stat. 950. The Committee Report on the bill (H.R. 14191) stated that "it is of the utmost consequence * * * that there be the most speedy determination of a vexed question that has dragged through forty years" (H.R. Rep. No. 2948, 56th Cong., 2d Sess. 1 (1901)).

titled to Sections 16 and 36 from all "public lands" within the State for schools.) This Court concluded that, while Minnesota would be entitled to Sections 16 and 36 of public lands even though no express exception in the instrument of conveyance was made (185 U.S. at 392-393), the land in question had never been restored to the public domain because the cession was in trust and the proceeds from uncertain future sales were to be deposited in the Treasury for the Indians' benefit (185 U.S. at 395). Thus Congress, if it wanted the State to receive Sections 16 and 36 while they remained within the opened Indian reservation, had to include an express provision to that effect. Such provisions were contained in all three Rosebud Acts.[14]

The legislative history of these provisions, though sparse, is instructive. In 1902, bills were introduced to ratify the Agreement negotiated with the Tribe in the previous year. The bill reported to the Senate, in addition to supporting approval of the Agreement, proposed an additional provision not originally negotiated: the inclusion of a requirement reserving Sections 16 and 36 in each township in Gregory County "for the use of the common schools" and granting those sections to the State of South Dakota. S. Rep. No. 662, 57th Cong., 1st Sess. 1-2 (1902). The bill was passed in the Senate, but the House Committee on Indian Affairs rejected not only the provisions permitting free-homesteads but also the school lands provision, stating (H.R. Rep. No. 2099, 57th Cong., 1st Sess. 1 (1902)).

> The opinion of the committee is that this section is *not necessary*, as under *existing law* sections 16

[14] A school lands provision was also contained in the Act of March 3, 1891, 26 Stat. 989, 1035, extinguishing the Lake Traverse Reservation. At that time, of course, this Court had not held that a State would be entitled to school sections out of public lands by the force of its Enabling Act alone, and Congress therefore included an express grant even in Acts providing for purchase of lands for a sum certain.

> and 36 would be granted to the State upon the extinguishment of the Indian title. [Emphasis added.]

The bill never reached the House floor for a vote (Pet. App. 16, n. 23).[15] When the Agreement for a sum certain was abandoned, however, subsequent bills included an express grant for school lands.

The question arose again in connection with the Act of 1910. Although the school lands provision was included in that Act without substantial debate, a similar provision in a bill to open lands in the Fort Berthold Reservation, North Dakota, was more fully discussed, The Fort Berthold bill, described as "practically in the same form" as the 1910 Rosebud Act (45 Cong. Rec. 5794 (1910)), provided for sales according to the

---

[15] The 1901 Agreement was an outright cession of Gregory County for a sum certain, which the Tribe conceded below would have extinguished the reservation status of the land and restored it to the public domain (Pet. App. 16). See *DeCoteau* v. *District Court, supra*, 420 U.S. at 447-449. The House Indian Affairs Committee understood that, under such circumstances, it was *not* necessary expressly to reserve Sections 16 and 36 for school purposes because the South Dakota Enabling Act of 1989 provided that those sections would automatically revert to the State when Indian title was extinguished. See 25 Stat. 676, 679, Section 10. The Senate Committee Report, supporting inclusion of the provision, was issued in March 1902, *before* this Court's decision in *Minnesota* v. *Hitchcock, supra*. The House Report was issued on May 17, 1902, after the *Hitchcock* decision. Congress "must be deemed to have known" that the exact issue it was dealing with was resolved by this Court in *Hitchcock*. *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 113. It was the House Report that accurately reflected existing law.

The court of appeals mistakenly relied (Pet. App. 29) on statements made by Senator Gamble in 1902 in favor of a school lands provision without noting that others regarded the provision as unnecessary. The court then juxtaposed those statements with statements made in 1904 (Pet. App. 30) after the sum certain method of payment had been discarded. The latter statements in fact simply emphasize the need to include school lands provisions when the uncertain-sum-in-trust method of payment is used.

uncertain-sum-in-trust method, except for Sections 16 and 36 which were to be purchased by the United States. After discussion of the school lands provision, Senator Jones of Washington stated (45 Cong. Rec. 6741 (1910)):

> I think I am thoroughly familiar with the terms of these various bills, and I am satisfied that these lands are *not restored to the public domain at all.* Their disposition is provided for in a special way. *The title of the Indians is recognized, and the lands are sold for the Indians.* They are to have the benefit.
>
> I am not going to object to the bill, and I am not going ot object to the provisions in it, but I did want to put in the RECORD my judgment that we are under *no obligation to purchase section 16 and 36, because we are not restoring these surplus lands to the public domain.* [Emphasis added.]

Senator Jones clearly recognized that the 1910 Fort Berthold Act, which was "practically in the same form" as the 1910 Rosebud Act, did not restore any lands to the public domain, and that Congress chose voluntarily to include a grant of school lands to provide schools in the opened territory.[16] The Eighth Circuit has held that the 1910 Fort Berthold Act did not diminish the exterior boundary of that Reservation. *City of New Town, North Dakota* v. *United States*, 454 F. 2d 121. It is highly unlikely that Congress would have intended a different result in substantially identical legislation passed within the same month.

2. There is also no reason to believe that these lands, not restored to the public domain by Acts of Congress, were nevertheless restored by issuance of the Presidential proclamations opening the lands for settlement. At that point, the trust was still in full effect and the Indians had

---

[16] Since the opened areas where to be populated largely by white settlers, this action seems consistent with the purpose of the school lands provisions in the States' Enabling Acts.

yet to receive any benefits under the particular Acts. Lands unsold or forfeited were to be restored to the Indians (presumably through the trust) and would not have been available for sale under the general laws. Thus they bear little resemblance to public lands.

This conclusion is fortified by *Ash Sheep Co.* v. *United States*, 252 U.S. 159. In 1899, the United States had negotiated an agreement with the Crow Tribe, by which the Tribe agreed to "cede, grant and relinquish" to the United States, for a lump sum, a portion of its reservation in Montana, 33 Stat. 352-356. In 1904, however, the Congress unilaterally "amended and modified" the unratified 1899 Agreement to include an uncertain-sum-in-trust provision, 33 Stat. 361 (Section 6), and a trusteeship provision, 33 Stat. 361 (Section 8), while retaining the "cede, grant, and relinquish" language of the 1899 Agreement. The land was opened by Presidential Proclamation in 1906, 34 Stat. (Part III) 3200, and "[m]uch thereof ha[d] been disposed of * * *." *United States* v. *Ash Sheep Co.*, unpublished opinion, Brief of the United States as Amicus Curiae in Support of Petition for Hearing and Rehearing en Banc, p. 66 (filed in the court of appeals).

In 1913, the Ash Sheep Company sought to graze sheep on unallotted lands opened for settlement without compliance with Interior Department regulations, claiming that the Act of 1904 had diminished the Reservation and converted the land affected into "public land." This Court disagreed, stating (252 U.S. at 165-166):

> It is obvious that the relation thus established by the act between the Government and the tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the *cestui que trust*. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 394, 398. * * *

> Taking all of the provisions of the agreement together we cannot doubt that while the Indians by the agreement released their possessory right to the Government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, *and that they did not become "Public lands"* in the sense of being subject to sale, or other disposition, under the general land laws. *Union Pacific R.R. Co.* v. *Harris*, 215 U.S. 386, 388. They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904, 33 Stat. 352. * * *. [Emphasis added.]

Thus, the Presidential Proclamation of 1906 clearly had not converted the Indian lands into public lands outside the Reservation.

Furthermore, a bill (S. 4632) to give settlers additional time to make payments on lands within various North and South Dakota Reservations (including the Rosebud) was introduced and considered in the Sixty Third Congress in 1914. 51 Cong. Rec. 8790 (1914). During the House debate of May 18, 1914, the consequences of non-payment by the settlers was discussed (51 Cong. Rec. 8791 (1914)):

> Mr. FOSTER: I want to say to the gentleman from South Dakota, on the statement he makes that these lands will probably go back to the Government, and that these people are really in distress—
>
> Mr. MANN: The Government does not own these lands?
>
> Mr. BURKE of South Dakota: *The Government does not own them.* The Government is undertaking to dispose of these lands for the benefit of the Indians.

Mr. FOSTER: Certainly. I understand.

Mr. BURKE of South Dakota: *And instead of giving money to the Indians, under the agreement of 1889*, so far as these reservations in South Dakota are concerned, *the money goes into the Treasury*, and we appropriate it for the support and civilization of the Indians. [Emphasis added.]

The point was also emphasized later in the debate (*ibid.*):

Mr. FOSTER: * * * if at the end of the time they do not desire to pay for them, the land goes back to the Government.

Mr. MANN: *The land goes back to the Indians.* [Emphasis added.]

3. We believe that Congress expected by the Acts in question "to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished." *Mattz* v. *Arnett, supra*, 412 U.S. at 496. While it might have been possible to diminish the reservation *pro tanto* as each plot of land was actually sold, that system seems both illogical and impractical. Under such circumstances Indians could not be sure from day-to-day what lands remained within the Reservation (and thus on what lands they became subject to state jurisdiction, see U.S. Department of Interior, *Federal Indian Law* 510-511 (1958)), and jurisdiction could only be exercised in checkerboard fashion according to local plat books. That cumbersome system should not be readily implied. *Seymour* v. *Superintendent, supra*, 368 U.S. at 358. Furthermore, the risk of forfeitures was always present given South Dakota's climate; the difficulties would only be increased as land, previously sold and removed from the Reservation, reverted to the trust upon nonpayment. Finally, the Indians living on the opened portion might be denied benefits available to Indians living on a Reservation.

By contrast, preserving the Reservation until the trust allotments expired would present fewer problems. The acquisition of land would not be impeded, for the settlers would own their land in the same manner and would be generally subject to state civil and criminal jurisdiction. *United States* v. *McBratnew*, 104 U.S. 621; *New York ex rel. Ray* v. *Martin*, 326 U.S. 496. The taxable base for the State and counties would be expanded, relieving the burdens of a locality previously inhabited largely by non-taxable Indians. At the same time, the Indians living on allotments would continue to receive needed federal benefits. While the State, of course, would not have jurisdiction over Indians on the Reservation, extension of State control over Indians has not generally been favored, *Rice v. Olson, supra.* This viewpoint is also consistent with treatment of the Reservation by the Department of the Interior, as we next discuss.

III. THE DEPARTMENT OF THE INTERIOR HAS ADMINISTERED THE ROSEBUD RESERVATION IN ACCORDANCE WITH THE BOUNDARIES ESTABLISHED IN 1

Although the State of South Dakota has asserted dominion over the opened portions of the Rosebud Reservation, the territory within the original boundaries of 1889 has been recognized and administered as a Reservation by the Department of the Interior.

1. The process of alienating "surplus" Indian lands pursuant to the allotment policy ended with the passage of the Indian Reorganization Act of 1934 (48 Stat. 984). *Mattz* v. *Arnett, supra,* 412 U.S. at 496, n. 18. Under Section 3 of that Act, the Secretary of the Interior was authorized "to restore to tribal ownership the remaining surplus lands of any Indian Reservation heretofore opened * * *," 48 Stat. 984, and under Section 7, he was authorized to proclaim "new Indian reservations * * * or to add such lands to existing reservations."

48 Stat. 985. Congress made clear, however, that "[n]othing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads *upon the public domain outside the geographic boundaries* of any Indian reservation now existing or established hereafter" (48 Stat. 986; Section 8) (emphasis added).

The legislative history of the Act establishes that its provisions were directed particularly to "opened" portions of reservations. John Collier, Commissioner of Indian Affairs, whose agency was largely responsible for drafting the original bills, testified: [17]

> There have been presented to the House Indian Committee numerous land maps showing the condition of Indian-owned lands on allotted reservations. The Indian-owned lands are parcels belonging (a) to allottees and (b) to the heirs of deceased allottees. Both these classes of Indian-owned land are checker-boarded with white-owned land already lost to the Indians, and on many reservations the Indian-owned parcels are mere islands within a sea of white-owned property.

Before the House Committee Commissioner Collier testifed[18]:

> * * Alienation under allotment takes place in a spotty way *throughout the entire area within the reservation*. Indian land is not lost in solid blocks. It passed into white hands in scattered parcels which increased year by year until the remaining Indian lands are checker-boarded by white lands. *In many areas they have shrunk to mere dots on the map surrounded by large areas of white land.*

---

[17] Hearings on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. 18 (1934).

[18] Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess. 30-31 (1934) (emphasis added).

After passage of the Indian Reorganization Act of 1934 the unexpired trust period on all land allotted to Indians within reservations was indefinitely extended. The Secretary of the Interior was required to identify those Acts that "opened" portions of Indian Reservations but did not convert those lands into "public domain" (54 I.D. 559). The Secretary noted that many reservation lands had been ceded for a sum certain and concluded that "[t]he lands thereby separated from a reservation were no longer looked upon as being a part of that reservation" (54 I.D. at 560.) However, the Secretary determined that a second type of disposition did not extinguish the Indian title and convert the land into public domain (*ibid.*):

> * * * [A]bout 1890 * * * there was adopted the plan of opening to entry, sale, etc., the lands of reservations that were not needed for allotment, the Government taking over the lands only as trustee for the Indians. Under this plan the Indians were to be credited with the proceeds only as the lands were sold, the United States not to be bound to purchase any portion of the lands so opened. Undisposed of lands of this class remain the property of the Indians until disposed of as provided by law (*Ash Sheep Company* v. *United States*, 252 U.S. 159). Such lands are usually referred to as surplus lands of Indian reservations opened to public entry, and undoubtedly comprise the class of lands from which restorations to tribal ownership are to be made under the said Section 3, if in the public interest.[19]

---

[19] Respondents' discussion of a 1938 opinion by the Acting Solicitor (56 I.D. 330), concerning the Colorado Ute Reservation. Reply Brief for Respondents' in Opposition, pp. 26-27, takes an opposite viewpoint, replying on language that "[t]he phrase 'of any Indian reservation' must be used in section 3 to describe the character and location of the lands at the time they were opened to disposal under the public land laws," 56 I.D. at 333. No mention is made, however, of the language in Section 8 that "[n]othing

The Secretary then proceeded to identify "a list of Indians to receive the proceeds of sale only as the reservations where the lands have been opened, the tracts are disposed of" (54 I.D. at 561).[20] In addition to the three Rosebud Acts of 1904, 1907 and 1910 (*id.* at 562), the Secretary listed some twenty-six other reservations.[21] While those reservations have been the source of continual litigation, not one court has ever held that the

---

contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside the geographic boundaries of any Indian reservation now existing or established hereafter." That qualification, read in conjunction with Section 3, indicates that the only lands governed by the Indian Reorganization Act were lands located within an Indian reservation that were opened but not restored to the public domain. Such lands, as the Court held in *Seymour* and *Mattz*, were not removed from Indian and federal jurisdiction.

Moreover, the lands at issue in the Colorado Ute case did not contain any Indian allotments. Three bands of Utes occupied this Reservation prior to 1880; each was permitted to select allotments within the Reservation before it was opened by the 1880 Act, but because little arable land was available, the Uncompahgre and White River Utes were "voluntarily" removed to Utah. The Southern Utes were the only band to remain, and they selected allotments in the southern portion of the Reservation where the arable lands were located, *Ute Indians* v. *United States*, 45 Ct. Cl. 440, 449, leaving the northern portion unallotted. The discussion by the Acting Solicitor, therefore, must be read in the context of these unusual facts. See also *Confederated Bands of Ute Indians* v. *United States*, 100 Ct. Cl. 413, 423, 424-430.

[20] Approximately one month later, a supplemental order was issued which included additional reservations. It stated that (*id.* at 564) "as to those townsites any part of which remains unsold within such areas, it is hereby recommended that said order * * * be construed to apply to the extent of temporarily withholding from other disposition any unsold lots or portions of any such townsites * * *."

Thus, even townships, which by the 1930's would be populated by numerous non-Indians, were encompassed by this Interior Department order.

[21] See cases cited, note 10, *supra*.

Indian title to the land affected was extinguished by the applicable Act of Congress and the land converted to public domain. In fact, when the question presented was whether the reservation boundaries continued to exist undiminished in size, each court decided that they had.

On December 3, 1937, the Assistant Commissioner of Indian Affairs recommended to the Secretary of the Interior that, pursuant to Section 3 and Section 7 of the Indian Reorganization Act, certain undisposed surplus lands "of the Rosebud Reservation, South Dakota" should be restored to tribal ownership.[22] (App. A, *infra*). These lands included vacant lands totaling some 4,649.25 acres, and also "remaining vacant and undisposed * * * lots within the townsites of Wamblee, Witten and Wewela, in the opened portion of the said Rosebud Reservation,

---

[22] The Secretary had previously approved the Constitution and Bylaws of the Rosebud Sioux Tribe (App. B, *infra*), pursuant to Section 16 (48 Stat. 987) of the Indian Reorganization Act. That section provides that "[a]ny Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws * * *." Article 1 of the Constitution defined the Tribe's jurisdiction as "the territory within the original confines of the Rosebud Reservation boundaries as established by the act of March 2, 1889, and to such other lands as may hereafter be added thereto under any law of the United States, except as otherwise provided by law." The Rosebud Sioux Tribe has had a law and order system since 1877, suported by Congressional appropriations. 19 Stat. 254, 257 (Art. 9). Its police force was organized in 1879, *Report of Commissioner of Indian Affairs*, 1879, p. 40, and the extensive nature of its law and order system was recognized by this Court in *Ex parte Crow Dog*, 109 U.S. 556. See also *Report of Commissioner of Indian Affairs*, 1881, p. 54. Congress authorized the establishment of Tribal Courts in 1888, 25 Stat. 233, and the Rosebud law and order system continued to function thereafter. *Report of Commissioner of Indian Affairs*, 1897, p. 277 and *Report of Commissioner of Indian Affairs*, 1890, p. 381. After the approval of the Tribal Constitution in 1935, the Tribal Government was reorganized, and the Tribe has continued to exercise jurisdiction throughout the 1889 Reservation over Tribal members. See App. C, *infra*.

which townsites were established by the Department, pursuant to authority contained in the Act of March 2, 1907, *supra*." *Id.* at 2A. The lands encompassed by this recommendation were in Tripp County, opened by the 1907 Act. On January 12, 1938, the Secretary issued an "Order of Restoration," restoring these lands to the Tribe (App. D, *infra*).[28]

2. Other actions confirm this view of the Rosebud Reservation as administered by the Department of the Interior. Department officials have repeatedly treated lands within Mellette, Tripp, Gregory and Lyman Counties, located within the 1889 Reservation boundaries, as reservation lands. This treatment belies the viewpoint of the court of appeals that Todd County alone has constituted the Rosebud Reservation since 1910.

For examples, in 1909, the Department, not having sold portions of the surplus lands made available by the 1904 Act to homesteaders, offered the remainder for sale at public auction. In a letter dated February 8, 1909, to the Commissioner of the General Land Office, the Secretary stated (37 I.D. 442-443):

> It is directed that *all that part of the Rosebud Indian reservation in Gregory County*, South Dakota, opened to settlement and entry by the act of April 23, 1904 (33 Stat. 254), which had not been entered prior to August 8, 1908, will be offered for sale * * *. [Emphasis added.]

The Department used similar language in 1913, directing sale of the lands opened by the 1907 Act:

---

[28] On August 20, 1964, the Congress placed in trust status certain federal lands "on the Rosebud-Sioux Reservation," which included tract E. ½ of Section 35, T. 42 N., R. 33 W. 6th P.M. in Mellette County. 78 Stat. 560.

Restoration orders, comparable to the 1938 Rosebud Order, were issued for the Colville Reservation, pursuant to a Congressional directive, 70 Stat. 626 (1956), *Seymour* v. *Superintendent*, *supra*, 368 U.S. at 356, and the Klamath River Reservation, *Mattz* v. *Arnett*, 412 U.S. at 496, n. 17 and 505.

> Sir: It is directed that all that *part of the Rosebud Indian Reservation in Tripp County*, South Dakota, opened to settlement and entry by the act of March 2, 1907 (34 Stat. 1230), which had not been disposed of on April 1, 1913, will be offered for sale at public auction * * * [42 I.D. 292].

Communications between Department officials are to the same effect. In April 1913, the Acting Commissioner of Indian Affairs, C. F. Hauke, submitted to the Superintendent of the Rosebud School a request for a report on the possible consequences of reorganizing the administrative structure of the Reservation. C.A. App. IV, Doc. 41.[24] Replying to the request, the Superintendent discussed, among other things, the status of Indian allotments in the various districts (or counties) opened for settlement. He stated (App. IV, Doc. 42, p. 4):

> *These two Districts* [Little White River and Black Pipe (both in Mellette County)] are the most troublesome of any of the Districts *on the Reservation*. The Bad Lands are located largely in these Districts which makes it difficult to go from place to place on account of the bad roads. The Cut Meat District [Todd County] has about 1,332 allotments with 299,120 acres, and a few over 1,000 Indians to look after. While it seems to be a large District, still there is but very little leasing of our Indian lands or allotments, *it being in the closed portion of our Reservation*, and the allotments are most compact with small farms in the District. The Agency has some over 1,200 Indians to look after, and is one of the largest Districts, but the farmer is assisted materially by being located in the Agency. [Emphasis added.][25]

---

[24] As used in this brief," "C.A. App." refers to the appendix filed in the court of appeals.

[25] This correspondence shows that the distinction between "closed" and "opened" portions of the Reservation is that non-Indians were formally permitted by Congress to enter the Reser-

That same year, the Supervisor of Industries and Agriculture for the Rosebud Reservation submitted a report to the Indian Office in Washington, D.C., regarding his inspection of portions of the Reservation. He stated (C.A. App. IV, Doc. 44, pp. 1-2):

> The reservation is divided into farmers' districts, and I believe an honest effort is being made to induce the Indians to farm; * * * In the *Ponca District* [Gregory and Tripp counties] *at the east end of the reservation* there is a Teacher in Charge residing at the Milk's Camp Day School. His duties are exactly the same as those of the additional farmers.
>
> Practically all of the day school teachers have been raising good gardens for a considerable time. * * * Except in the *Ponca District* [Gregory and Tripp counties] *at the east end of the reservation,* which is a farming district, I do not consider the Rosebud country a farming country. [Emphasis added.]

Moreover, the Report of May 13, 1914, from the Supervisor at Rosebud to the Honorable Cato Sells, Commissioner of Indian Affairs (App. IV, Doc. 51, p. 3), states:

> The [Rosebud] *reservation* is divided into seven farmer districts, each presided over by a farmer paid at a rate of $900 per annum, except the *Ponca district* [Gregory and Tripp counties] in the *extreme eastern end of the reservation,* which is presided over by a teacher-in-charge at $1000 per annum. [Emphasis added.]

Thus, the contemporaneous view of the Department officials was that the reservation boundaries were not changed by the Acts of 1904, 1907 and 1910.

---

vation in one portion (*i.e.*, "opened") while not others (*i.e.*, "closed"). Both parts, however, were administered as the Rosebud Reservation.

More recently, in 1939, the Division of Forestry and Grazing of the Rosebud Reservation forwarded to the Commissioner of Indian Affairs a "map of the Rosebud Indian Reservation showing different types of roads" and identifying important landmarks regarding the location of the roads (*e.g.*, schools, fire look-out stations) (App. E, *infra*). The letter identifies roads and trails constructed by either the County or the Indian Service in Mellette, Tripp, Lyman and Gregory Counties; the location of new schools in Black Pipe (Mellette); the location of fire look-out tower sites in Cedar Butte (Mellette); and the construction of government and private telephone lines in Mellette and Tripp Counties. These facilities all were considered part of the Reservation.

In 1942, the Interior Department's Fish and Wildlife Service undertook a wildlife survey on the Reservation in order to assist the Tribe in managing their resources (App. F, *infra*). The Report on the survey was completed in August 1942 and transmitted to the Commissioner of Indian Affairs in September. The Report contains this description of the Rosebud Reservation (*id.* at 39A-40A):

> The *entire reservation* is included in Tripp, Gregory, Mellette, and Todd Counties, and covers a gross area of 3,555,833 acres. Alienated white lands total 2,468,888 acres of this area. Most of the field work was conducted on the *so called* "Dimished Reservation" in Todd County. This area, including alienated land, totals approximately 894,080 acres. Much of this is checkerboarded although there are some large solid blocks of Indian land. The largest percentage of the diminished reservation is Indian owned. Approximately 7,000 Indians are enrolled in the tribe. [Emphasis added.]

The Bureau of Indian Affairs continued, prior to this law suit, to administer all five counties as part of the Rosebud Reservation. From 1969 through 1974 requests

for Congressional appropriations were based on population statistics which included all Indians living within the exterior boundaries of the 1889 Reservation, and clearly distinguished those from a lesser number living off, but near the Reservation.[26] Various social services were provided to Indians living in all these counties, including child welfare and burial assistance; a BIA outpatient clinic is located in Mellette and Tripp Counties; and housing was provided by BIA or Tribal funding since 1963. Moreover, the Department of Housing and Urban Development, which makes grants only where a tribe has authority to act as a "governmental entity" or "public body" (42 U.S.C. 1460(h)), has been providing financial assistance to the Tribe (Memorandum of the United States as Amicus Curiae supporting petition for certiorari, p. 11). See also Opinion of the Field Solicitor on the exterior boundaries of the Rosebud Reservation in 1972 (C.A. App. IV, Doc. 56).

The agency responsible for administering the Rosebud Reservation, therefore, has greatly regarded the original reservation boundaries as unchanged by the Acts of 1904, 1907, 1910. That understanding is entitled to more weight than it was accorded by the court of appeals, *Mattz* v. *Arnett, supra,* 412 U.S. at 505, and, we believe, is more instructive than the ambiguous legislative history discussed in the following section.

IV. THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS DID NOT CONSIDER QUESTIONS OF JURISDICTION AND IS THEREFORE OF MARGINAL BENEFIT IN THIS CASE

The court of appeals gave primary, if not conclusive, weight to the legislative history of the three Acts (Pet.

---

[26] See App. A, Brief of the United States as *Amicus Curiae* in the court of appeals below.

App. 9-60).[27] While legislative history may be useful in these inquiries, *DeCoteau, supra,* 420 U.S. at 444-445, we do not believe the history in this case merits the emphasis it enjoyed below. For Congress, in passing these three Acts, at no time addressed the question of jurisdiction. Page after page of the legislative history shows that Congress was concerned with *land* not *jurisdiction.* Thus, that history is at best a slender reed on which to support extinction of most of the Rosebud Reservation.

During the early 1900's there was no reason for Congress to be greatly concerned about jurisdiction. The principal reason for opening the Rosebud Reservation, as the court of appeals recognized (Pet. App. 9, 34, 44), was the desire of settlers for land. This desire was compatible with the interests of States having great reservations within their boundaries, who sought a broader tax base through increased land ownership by non-Indians (*e.g.,* A. 276). Both objectives could be accomplished either by purchase for a lump sum or by purchase through the uncertain-sum-in-trust method. At the same time, the Indians would be exposed to new, presumably more civilized, ideas that would hasten their assimilation into our culture. As that assimilation occurred, and the trust period on allotted lands gradually expired, the Reservations could be abolished. *Mattz, supra,* 412 U.S. at 496.

The debates reflect Congress' lack of attention to jurisdictional matters. Throughout the consideration of these three Acts, Congress discussed the desirability of the lands, the method of payment, the price to be paid by settlers, the need for school lands provisions, and many other matters, but not once addressed the issue of crimi-

---

[27] A law journal article, written in part by present counsel for South Dakota, had previously reviewed the legislative history in some detail and urged the result reached below. Comment, *New Town, et al.: The Future of an Illusion,* 18 S.D. L. Rev. 85 (1973).

nal and civil jurisdiction within the opened Reservation.[28] Although the court of appeals relied on scattered remarks that suggest abolition of the Reservation, these remarks are necessarily taken from discussions on different subjects and are often contradicted by other references of a similar nature. While exhaustive citation is not necessary, a brief review of materials not cited by the courts of appeals should demonstrate the uncertainty surrounding the legislative history in this case.

1. The view of the legislative history taken by the court of appeals proceeds from the assumption that the Acts of 1904, 1907, and 1910 were extensions of the unratified 1901 Agreement (Pet. App. 22, 23, 25, 38, 40, 48). Although we agree that the 1901 Agreement and the three Acts had a common purpose of providing Indian lands to white settlers, the differences between them merit further attention.

In 1901, the Rosebud Sioux Tribe agreed by a three-fourths majority of the adult male population to "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest" in all that part of the Reservation located in Gregory County, South Dakota, remaining unallotted, in return for a lump sum pay-

---

[28] Jurisdiction is mentioned, albeit tangentially, in the debate on the liquor provision in the 1910 Act. That provision made all land in Mellette County subject to the liquor laws applicable in "Indian Country." Although the courts below suggested that the provision would be unnecessary if the Reservation were continued (Pet. App. 56-58, 102-103), that suggestion is erroneous. As the debates show, 45 Cong. Rec. 5460-5464 (1910), members of Congress were fully aware of this Court's decision in *In re Heff*, 197 U.S. 488, holding that Indian allottees were subject to *state* liquor laws. While opponents of the provision believed that state jurisdiction was sufficient, supporters noted that dependency on state liquor laws presented a grave risk to Indian well-being (45 Cong. Rec. 5460-5464 (1910)). Thus federal control was expressly continued for twenty-five years, the trust period on Indian allotments, at which time abolition of the Reservation could be considered.

ment of $1,040,000 (Pet. App. 14 and 15, n. 21). This agreement, which was negotiated by the Interior Department's Inspector, James McLaughlin, was to be effective "when accepted and ratified by the Congress of the United States" (id. at 15).[29] That ratification of course never occurred.

Three years later, after several previous bills had failed to pass, a new bill was introduced which unilaterally "amended and modified" the 1901 Agreement. The primary amendments were that (1) the Indians were not guaranteed a lump sum consideration, except for Sections 16 and 36 (school sections), but were to be paid as lands were actually sold (Section 6, Pet. App. 120); (2) the United States did not guarantee to find purchasers but agreed only to "act as trustee for said Indians to dispose of said lands" (Section 6, Pet. App. 120); and (3) limitations were placed on the distribution of the proceeds to the Indians (compare Art. III, Pet. App. 118 with Art. III, Pet. App. 115-116). In addition, the 1904 bill eliminated any reference to tribal consent by three-quarters of the male adults, and included a provision granting Sections 16 and 36 to the State for common school purposes (Section 4, Pet. App. 120). It was enacted on April 23, 1904, 33 Stat. 254.[30]

Although the court of appeals stated that "[t]he 1904 Act, incorporating the entire text of the 1901 Agreement (save for the lump-sum provision) passed under the circumstances [previously discussed], was obviously an outgrowth of and a continuation of the objectives of the 1901

---

[29] Approval of three fourths of all the adult male Indians, before an agreement was considered valid, was required by the Treaty of 1868, 15 Stat. 635, 639 (Art. XII) (Pet. App. 14, n. 20).

[30] Despite these numerous and material changes the court of appeals somehow concluded that the 1904 Act "amended the 1901 Agreement solely with respect to the method of payment" (Pet. App. 23).

Agreement" (Pet. App. 25), that conclusion, while technically correct, is misleading. The 1901 Agreement itself does not evidence a specific intention to cut down reservation boundaries; at most, that intention could be presumed from the bilateral nature of the agreement and by the provisions for outright purchase of the lands for an indicated sum. *DeCoteau, supra.* That presumption is unavailing, however, once the nature of the agreement and the method of payment are changed. The objective of securing new lands for non-Indian settlers surely was continued, but that is not material to the question of jurisdiction over the settled lands.

2. The court of appeals also proceeded on the assumption that the terms "reservation" and "diminished reservation" had one settled, precise meaning throughout the legislative history. Thus, the court relied heavily on various references to the "reservation" and the "diminished reservation" (Pet. App. 12, 13, 14, 26-28, 39, 40-41, 44, 45, 51-52, 54, 57, 58, 59) to show that the exterior boundaries of the Rosebud Reservation had been cut back. Consideration of similar references in the legislative history, however, indicates that the terms were often used in shorthand fashion without the precision that the court of appeals supposed.

For example, the term "diminished reservation," as used in the 1910 Act, appears to include not only Todd County (the closed portion) but also Mellette County (the portion to be opened). The May 30, 1910 Rosebud Act provides in part, 36 Stat. 449 (Section 1):

> [A]ny Indians to whom *allotments* have been made *on the tract to be ceded* [Mellette County] may, in case they elect to do so *before* said lands are offered for sale, relinquish same and select allotments in lieu thereof on the *diminished reservation* * * *. [Emphasis added.]

Section 2 of the Act, however, directs the Secretary to dispose of the unallotted lands in Mellette County after a presidential proclamation, provided (*ibid*):

> That prior to said proclamation the *allotments within the portion* of the said Rosebud Reservation *to be disposed of* [Mellette County] as prescribed herein shall have been completed * * *. [Emphasis added.]

Since the Indians could select new allotments in Mellette County prior to the presidential proclamation, as well as in Todd County, "diminished reservation" seems to refer not merely to the closed portion of the Reservation but to the " 'area of the reservation * * * diminished in size by reason of the settlement of the unalloted lands by non-Indians.' " *Putnam v. United States*, 248 F. 2d 292, 295 (C.A. 8). In *United States ex rel. Condon* v. *Erickson*, 478 F. 2d 684, 687 (C.A. 8), the court of appeals recognized that a similar use of the term could mean that "the reservation * * * retained its original exterior boundaries even though the portion held by Indians was diminished by virtue of the sale of lands within the boundaries to outsiders. The court then continued: "Indeed, this would be consistent with 18 U.S.C. § 1151 defining Indian Country as lands within the limits of a reservation *notwithstanding the issuance of any patent*" (*ibid.*; emphasis in original).[31]

---

[31] In a November 12, 1910, letter regarding the 1910 Act, the Assistant Commissioner of Indian Affairs stated (C.A. App. IV. Doc. 40B):

"The diminished reservation,—that is, the lands remaining *after* the allotments [to Indians] and sale of lands [to homesteaders] referred to, *will consist of about 40 townships*, which may be used to provide allotments until such time as there are no unallotted lands therein." [Emphasis added.]

In 1910 Mellette County consisted of 837,125 acres (36 full townships) and a number of irregularly sized townships. Thousands of these acres had already been allotted to Indians *prior* to the opening, and could not "be used to provide allotments * * *"

At other times, "diminished reservation" seems to mean only the closed portion of the Reservation. The Report prepared by the Fish and Wildlife Service in 1942 (App. F, *infra*, at 39A), for example, states that "[t]he entire [Rosebud] reservation is included in Tripp, Gregory, Mellette, and Todd Counties," and notes that "[m]ost of the field work was conducted on the so called 'Diminished Reservation' in Todd County." This is the same portion of the Reservation that the Superintendent of Rosebud School described as "the closed portion of our Reservation * * *" (*supra*, p. 35).

Construction of the term "reservation" also leads in various directions. While some references to the Rosebud "reservation" appear compatible with the court of appeals' analysis, other references do not. Thus, within a year after the 1904 Act was passed, the homesteaders in Gregory County petitioned Congress for an extension of time to establish their residence upon lands opened to settlement. The Senate and House Committee Reports both refer to the lands in question as "*lands within the confines of that part of the Rosebud Indian Reservation* thrown open to entry * * * (emphasis added). H.R. Rep. No. 4198, 58th Cong., 3d Sess. (1905); S. Rep. No. 2760, 58th Cong., 3d Sess. (1905) And, after describing the need for the legislation in light of bad

---

after the opening. To find "about 40 townships" available for allotment, therefore, it would be necessary go beyond Mellette County.

In 1911, a few months after Mellette County was opened to settlement, there existed in Todd County less than 220,000 acres that could "be used to provide allotments * * *" to Indians, S. Rep. No. 1166, 62d Cong., 3d Sess. 4 (1913), the remainder having long since been allotted or reserved for agency and school purposes. The remaining 700,000 acres referred to by the Assistant Commissioner appears to have been an estimate from existing Department records of the land remaining throughout the entire 1889 Reservation for the purpose of allotment, "diminished" by the lands already alloted to Indians or occupied by homesteaders.

climatic conditions causing delays in payments by homesteaders, the Senate Committee Report states (*id.* at 2):

> A further fact which influences the committee in making a favorable report is that these settlers are under conditions different to those affecting the ordinary homestead settler. Entrymen on the reservations in question have to pay $4 an acre in the case of the Rosebud Reservation * * *.

This legislation became law on February 7, 1905, 33 Stat. 700.

On March 3, 1909, Congress enacted an appropriation for the Indian Department for the fiscal year ending June 30, 1910. 35 Stat. 781. Under Section II of the Act, Congress made appropriations for reservations within various states, including South Dakota. 35 Stat. 808. Additionally, Congress authorized the Secretary to permit the establishment of catholic missions "on the Rosebud Reservation." 35 Stat. 809. The missions were to be located as follows (*ibid.*):

> *On the Rosebud Reservation*, at or near Saint Francis Mission * * *; also, at or near Red Leaf Camp * * *; also, at or near Oak Creek * * *; also, at or near Antelope Creek * * *; also, at or near Little White River * * *; *also, at or near Ponca Creek*. [Emphasis added.]

Ponca Creek is located in Gregory County, opened by the Act of 1904.

In 1911 Congress had before it a bill for relief of settlers in the area opened by the Act of 1907. Representative Stephens, who called up the bill, described it as a "bill (H.R. 13044) extending the time of payment to certain homesteaders in the Rosebud and other Indian reservations in South and North Dakota * * *" (47 Cong. Rec. 3840 (1911)) and then stated (*id.* at 3841):

> Mr. Speaker, we have gone at some length into the question of the great drought-striken country of the West in the bill which has already passed the House and we have shown the House beyond all question that a severe drought has extended all over the West, including South Dakota. *The Rosebud Reservation, where these lands are situated,* is now, in the main, in the hands of settlers * * *. [Emphasis added.]

The bill became law on April 17, 1911, 37 Stat. 21.

In 1918, Mr. Gandy, a representative from South Dakota, introduced a bill (H.R. 12082) ("authorizing the sale of certain lands in South Dakota for cemetery purposes." 56 Cong. Rec. 6469 (1918). The bill was referred to the Committee on Indian Affairs, which reported (H.R. Rep. No. 742, 65th Cong., 2d Sess. 1 (1918)):

> This is a bill to authorize the sale of 10 acres of tribal land *on Rosebud Indian Reservation in Mellette County S. Dak., and belonging to the Rosebud Tribe of Indians,* to the White River Cemetery Co. * * * It is provided that the Secretary of the Interior shall sell the land * * * and that the money received shall be deposited in the Treasury of the United States to the credit of the Rosebud Tribe of Indians. [Emphasis added.]

In the following year, during debate on a bill to pay for fire damages on the Todd County portion of the Rosebud Reservation, 58 Cong. Rec. 4933 (1919), Mr. Gandy observed that "[t]he Rosebud Reservation embraces about 7,000 square miles." However, Todd County, which the Eighth Circuit found to be the *only* portion of the original Rosebud Reservation remaining in 1919, is less than 1,500 square miles (approximately 800,000 acres). The 1889 Rosebud Reservation, undiminished in size, is in excess of 5,000 square miles (3,228,160 acres).

In December 1910, the Town of White River, located in Mellette County, South Dakota, sought approval from the Federal Power Commission for construction of an electric power line across Indian lands. The FPC notified the Town that if "tribal Indian lands are to be crossed * * * prior approval of the proper reservation authorities" was required (App. G, *infra,* p. 41A). The FPC then notified the Secretary of the Interior that the "Town of White River, South Dakota, has filed with the Commission an application for license * * * affecting lands of the United States within the Rosebud Indian Reservation" (App. G, *infra,* p. 42A). Thus, both the Town of White River and the FPC acknowledged that power line construction in Mellette County would affect lands within the Reservation and was subject to approval of "reservation authorities."

In June, 1941, the United States filed a Declaration of Taking in the United States District Court for the District of South Dakota, in order to acquire land "for the use of the United States of America, * * * in connection *with the Two Kettle Project on the Rosebud Indian Reservation in South Dakota* * * *" (App. II, *infra,* pp. 44A, 50A) (emphasis added.) The lands acquired were described the District Court as (*id.* at 50A)

> * * * containing 610.10 acres of land, more or less, *in Mellette County,* South Dakota, designated as Tract No. 189 of the Two Kettle Project *on the Rosebud Indian Reservation* [Emphasis added.]

The District Court entered its Findings of Fact and Conclusions of Law, as well as its final judgment, on December 12, 1941 (*id.* at 44A).

In 1945 Senator Bushfield, a Senator from South Dakota, introduced a bill (S. 1564) directing the Secretary of the Interior to issue a fee patent to Shadrick Ponca, a Rosebud Sioux Indian. The relevant Committee Report stated (S. Rep. No. 1442, 79th Cong., 2d Sess. 1 (1946)):

> Shadrick Ponca, is the sole heir of his deceased mother, Millie or Wing Ponca, who bequeathed to him her allotted lands *on the Rosebud Indian Reservation, S. Dak., described in this bill, which lands are situated in Gregory County, S. Dak.*, a distance of more than 50 miles from applicant's home in the village of Okreek, in Todd County, S. Dak., where applicant, Shadrick Ponca, lives in his own home * * *[32]

Two years later, Senator Bushfield asked the Commissioner of Indian Affairs for a report on the application of Charlotte Gordon Odden for a patent in fee covering her allotment in Tripp County, South Dakota. The Commissioner stated in his letter of August 21, 1947 (App. I, *infra*):

> Receipt is acknowledged of your letter of August 11 about Mrs. Charlotte Gordon Odden's application for a patent in fee covering her 160-acre allotment, No. 4248, *on the Rosebud Reservation, described as* the SW ¼ sec. 11, T. 96N., R. 74W., 5th P.M., *Tripp County, South Dakota.* [Emphasis added.]

The inconsistency in these references is not surprising in view of the fact, discussed previously, that Congress did not squarely face the question of jurisdiction over the opened lands; other more controversial matters claimed its attention. It is inappropriate, therefore, to select certain statements from the mass of ambiguous materials and draw inferences from these, as the courts below did.[33]

---

[32] The bill was passed by the Senate on June 14, 1946, 92 Cong. Rec. 6920, introduced into the House, 92 Cong. Rec. Rec. 7120, and referred to the House Committee on Indian Affairs. 92 Cong. Rec. 7399-7400. There was no further action during the 79th Congress, and although the South Dakota Senator introduced it again in the 80th Congress, 93 Cong. Rec. 3219 (1947), it did not become law.

[33] We also think the court of appeals misapprehended the significance of the fact that non-Indians and Indians live within the

Read in its entirety, the legislative history does not show a clear intent to cut back the Reservation boundaries.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

H. BARTOW FARR,
Assistant to the Solicitor General.

EDMUND B. CLARK,
NEIL T. PROTO,
Attorneys.

SEPTEMBER 1976.

Reservation and utilize State and Federal facilities or benefits. Neither fact is inconsistent with the continued existence of the Rosebud Reservation. Only 19% of the Flathead Tribe live within the Flathead Reservation in Montana. *Confederated Salish and Kootenai Tribes* v. *Namen*, 380 F. Supp. 452, 457, n. 5 (D. Mont.), and considerable expenditures by both the State and Federal governments within the area provide benefits to all residents. *Confederated Salish and Kootenai Tribes* v. *Moe*, 392 F. Supp. 1297, 1313-1314 (D. Mont.). Similarly, the entire City of Tacoma, Washington, is within an Indian Reservation (Brief of the United States as Amicus Curiae in Support of Petition for Rehearing and Rehearing en Banc, p. 95 (filed in court of appeal); see also *United States* v. *Washington*, 496 F.2d 620 (C.A. 9), certiorari denied, 419 U.S. 1032), and this Court recognized the presence of non-Indians within the Colville Reservation. *Seymour* v. *Superintendent, supra*, 368 U.S. at 358-359. This pattern represents nothing more than the logical consequence of Acts "opening" Indian reservations to white settlement around the turn of the century.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 82-1253

HERMAN S. SOLEM, WARDEN, and MARK V. MEIERHENRY, ATTORNEY GENERAL OF SOUTH DAKOTA, PETITIONERS

v.

JOHN BARTLETT

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The special relationship of the United States to the Indian Tribes is too familiar to require restatement. It precedes the Constitution, was confirmed by it, and is evidenced in a long course of treaties and Executive Orders. The attendant national powers and duties are particularized in a multitude of Acts of Congress. Of immediate relevance here is the status of a remnant of the Great Sioux Reservation—itself established by treaty in 1868 and later reduced and broken up into segments by congressional legislation in 1889—as it may have been

further diminished by an Act of 1908. The result will affect, inter alia, the continuing federal responsibility for law enforcement within the disputed area under 18 U.S.C. 1152 and 1153.

In light of this continuing federal interest, the Court invited the Solicitor General to file a brief expressing the views of the United States at the jurisdictional stage. Now that the case is to be heard on the merits, we deem it appropriate to make a further submission.

STATEMENT

1. Respondent John Bartlett, an enrolled member of the Cheyenne River Sioux Tribe, pleaded guilty in 1979 in a South Dakota state court to a charge of attempted rape. The crime took place on an alienated parcel of land in Eagle Butte, South Dakota, which lies within the portion of the original Cheyenne River Indian Reservation that was opened to settlement by the Act of May 29, 1908, ch. 218, 35 Stat. 460 *et seq.* Pet. App. A2-A3.[1] After Bartlett's request for post-conviction relief was denied by the South Dakota court in which he had entered his plea (Pet. App. A2 n.1), he filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. (Supp. V) 2254, in the United States District Court for the District of South Dakota. There, he contended that the crime was committed in "Indian country", as defined in 18 U.S.C. (Supp. V) 1151, and that, accordingly, exclusive jurisdiction to prosecute

[1] The Reservation was once part of the Great Sioux Reservation, established by the Treaty of Apr. 29, 1868, 15 Stat. 635 *et seq.*, from which the Black Hills area was taken in 1877. Act of Feb. 28, 1877, ch. 72, 19 Stat. 254 *et seq.* The Cheyenne River Reservation emerged as a separate unit in 1889, when another substantial portion of the large Reservation was ceded and the remainder was carved up into six distinct Reservations. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 *et seq.* See *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 589 (1977). As defined in 1889, the Cheyenne Sioux Reservation comprised about 2.8 million acres. The area opened in 1908 embraces some 1.6 million acres.

him rested with the Sioux Tribe or the federal government. The State of South Dakota, on the other hand, argued that the 1908 Act terminated the reservation status of the portion opened to sale to non-Indians and divested the Tribe and the United States of jurisdiction over alienated lands in that area. Pet. App. A2-A3.[2]

2. The district court applied the rulings of the Court of Appeals for the Eighth Circuit in *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (1973), and *United States* v. *Dupris*, 612 F.2d 319 (1979), vacated and remanded, 446 U.S. 980 (1980), to the effect that the Cheyenne River Indian Reservation was not disestablished or diminished by the 1908 Act. Therefore, despite contrary decisions by the South Dakota Supreme Court,[3] the district court held that the State was precluded from exercising its criminal jurisdiction over Bartlett since the opened portion remained "Indian country" within the meaning of 18 U.S.C. (Supp. V) 1151. The court granted the writ of habeas corpus, but stayed the effect of its decision pending the outcome of any appeal. Pet. App. A1-A8, A96-A97.

3. The court of appeals, sitting en banc, affirmed (Pet. App. A9-A11), Judges McMillian and Arnold dissenting (Pet. App. A11-A12).[4] The court declined to overrule

---

[2] It was correctly assumed by both parties that, having chosen not to invoke the option offered by Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 *et seq.*, as amended in 1968, now 18 U.S.C. 1162, 25 U.S.C. 1321-1326, 28 U.S.C. 1360), South Dakota could exercise no criminal jurisdiction over a tribal member within "Indian country," which includes alienated parcels embraced by federally recognized Indian Reservations. See *Williams* v. *United States*, 327 U.S. 711, 714 (1946); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *United States* v. *John*, 437 U.S. 634 (1978).

[3] *South Dakota* v. *Janis*, 317 N.W.2d 133 (1982); *Stankey* v. *Waddell*, 256 N.W.2d 117 (S.D. 1977).

[4] The United States, the Cheyenne River Sioux Tribe, and the Standing Sioux Tribe participated as amici curiae in support of Bartlett. The Counties of Dewey, Corson and Ziebach, South

United States v. *Dupris*, and found that *Dupris*, *United States* v. *Long Elk*, 565 F.2d 1032 (8th Cir. 1977), and *United States ex rel. Condon* v. *Erickson*, were consistent with this Court's decision in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977). Pet. A10-A11.

INTRODUCTION AND SUMMARY OF ARGUMENT

The only issue before the Court is the continuing status as "Indian country" of a portion of one Indian Reservation in South Dakota. That question has been squarely decided against the claim of "diminishment" or "disestablishment" in at least three holdings of the Court of Appeals for the Eighth Circuit, *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (1973); *United States* v. *Dupris*, 612 F.2d 319 (1979), and the present case. See also, *United States* v. *Fay*, 668 F.2d 375 (1981), affirming in part a criminal conviction under 18 U.S.C. 1153 in respect of offenses committed at Eagle Butte without discussion of the jurisdictional issue. The first of these decisions has been cited and quoted with approval in *Mattz* v. *Arnett*, 412 U.S. 481, 497 n.19, 505 (1973), a precedent since reaffirmed by this Court. See *DeCoteau* v. *District County Court*, 420 U.S. 425, 444, 447-449 (1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586-587 (1977). What is more, on two occasions, the Eighth Circuit has expressly revisited its seminal *Condon* decision in light of this Court's more recent *DeCoteau* and *Rosebud* rulings and the contrary holdings of the South Dakota Supreme Court and has determined to adhere to its conclusion. *E.g.*, *United States* v. *Long Elk*, 565 F.2d 1032, 1034-1040 & n.10 (1977); *United States* v. *Dupris*, 612 F.2d at 321-323. And, now, after reconsidering the matter en banc, that court has firmly settled the question.

Dakota, and Sioux County, North Dakota, participated as amici curiae in support of the State.

In this situation, there would normally be no occasion for further review. In *Seymour* v. *Superintendent*, 368 U.S. 351 (1962), *Mattz*, *DeCoteau* and *Rosebud*, this Court announced the governing guidelines. These have remained unchanged. As the Court was at pains to declare in *DeCoteau* (420 U.S. at 447), "[w]e adhere without qualification to both holdings [*Seymour* and *Mattz*] and the reasoning of those decisions." No one can doubt that the court below has been meticulous in its attempt faithfully to apply those standards in each situation. It was, we stress, the Eighth Circuit that first found diminishment in the case of the Rosebud Reservation. *Rosebud Sioux Tribe* v. *Kneip*, 521 F.2d 87 (1975), aff'd, 430 U.S. 584 (1977). The court of appeals was then credited with a "careful and comprehensive opinion." 430 U.S. at 585. After giving the matter equally full consideration on three occasions, it cannot be faulted for reaching a different result, on different facts, in the case of the Cheyenne River Reservation.

We cannot suppose this Court is now inclined to reconsider its own decisions and to revisit every lower court ruling implementing them—especially those previously cited with approval.[5] Acquiescing in that invitation—apparently tendered by petitioners—would impose an awesome burden and entail very unsettling consequences for all concerned, Indians and non-Indians alike. Rather, we assume the Court has determined to review the present case because of the conflicting decisions of the South Dakota Supreme Court. *Stankey* v. *Waddell*, 256 N.W.2d 117 (1977); *South Dakota* v. *Janis*, 317 N.W.2d 133 (1982). Thus far, that court has declined to accept the ruling of the federal appellate court as settling this issue of federal law. Apparently, the South Dakota Supreme Court was most recently emboldened (in *Janis*) by this

[5] In *Mattz*, this Court listed the 1908 Act involved here as an example of an "opening" statute that did not work disestablishment and approvingly cited the Eighth Circuit's *Condon* decision, followed in this case. 412 U.S. at 497 n.19, 505 n.23.

Court's action (446 U.S. 980 (1970)) vacating the Eighth Circuit's *Dupris* decision as probably moot.[6] See 317 N.W.2d at 137-138. At all events, now that the Court has granted review, it is to be hoped that a clear message will emerge, discouraging other state courts from prolonging disruptive controversies over the status of Indian Reservations. We urge the Court to re-affirm the controlling standards and to conclude that they were correctly applied by the court of appeals.

A.

We begin by re-examining the Court's past decisions in an attempt to distill the general principles that govern issues of Reservation "termination," "disestablishment," or "diminishment." The critical question remains whether the statute invoked worked an immediate and irrevocable cession, or merely opened up a part of the Reservation to purchase by settlers, with the expectation that, in due course, the entire opened area would be acquired and then separated from the remaining Indian territory. Our submission is that where such an opening scheme substantially failed and a significant portion of the opened lands remained unsold when Congress changed policy and halted sales, the area retains Reservation status.

B.

Applying these guidelines to the present case, we conclude that the Cheyenne River Reservation has not been disestablished or diminished. The Act of 1908 involves no outright cession, nor even any agreement by the Tribe. It is, rather, a typical "opening" statute, indistinguishable from the legislation considered in *Seymour* and *Mattz*. And, unlike the result in *Rosebud*, most of the

---

[6] On remand, the case was ultimately mooted by the court of appeals' direction to the district court to grant the government's motion to dismiss the information against Dupris. 664 F.2d 169 (1981).

opened lands were never sold and were ultimately "restored" to full Reservation status. In other respects, also, the opened area of the Cheyenne River Reservation has remained Indian. In these circumstances, it seems consistent with both the historic intent of Congress and more recent legislative policy to preserve the original boundaries of the Reservation.

ARGUMENT

A. The Governing Principles

1. In considering questions relating to the "termination," "disestablishment" or "diminishment" [7] of Indian Reservations, we must remember that they almost inevitably arise out of congressional legislation enacted near the turn of the last Century, a time when the Political Branches were wholly committed to a policy designed, in due course, to liquidate the Reservation system and accomplish the assimilation of the Indian. The first step, exemplified by the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq.*, was to encourage—and shortly to compel—the Indian to abandon his roaming habits, his communal life, his "tribalism," and to become a self-sufficient farmer, tied to a homestead.[8] To that end, property ownership was to be individualized,

[7] Like Petitioners, we speak of "diminishment" as synonymous with "disestablishment" and "termination," but as applied to a discrete portion, rather than the whole of the Reservation. So used, all three terms imply that the affected area has entirely and permanently lost its Reservation status. In the case of "diminishment," the affected portion is jurisdictionally removed from the subsisting Reservation, whose boundaries are redrawn to exclude that area. It does not, of course, follow that the same meaning should be attributed to the word "diminished" whenever it occurs in Legislative or Executive Branch documents.

[8] There were, to be sure, much earlier experiments with allotment, mainly with the same objectives as the later legislation. But few such plans were fully carried out. See F. Cohen, *Handbook of Federal Indian Law* 98-102, 129-130 (1982 ed.).

and the not unimportant side benefit of allotting the Reservation land among the members would be to open up the substantial "surplus" to white settlers. Although the precise mechanisms varied, the ultimate objectives were always the same: "educating" and "civilizing" the Indian, relieving the federal Treasury of burdensome annual subsidy payments, and releasing "unneeded" tribal land for exploitation by others. In every case, moreover, the expectation was that, sooner or later, perhaps within a generation, the Tribe and its Reservation would cease to exist. See generally, F. Cohen, *Handbook of Federal Indian Law* 206-217 (1942); J. Kinney, *A Continent Lost—A Civilization Won* (1937); D. Otis, *History of the Allotment Policy*, reprinted in Hearings on H.R. *7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess., Pt. 9, at 428 *et seq.* (1934). See also, *Montana* v. *United States*, 450 U.S. 544, 559-560 n.9 (1981).

This perception might lead us to view as disingenuous all attempts at pursuing the exact intent of Congress in the period of 1890 to 1910 when it allotted and opened up particular Reservations. Disregarding fine points, one might be tempted to rush to the conclusion that the Congressional purpose was plain enough in each instance: termination or "disestablishment" of the Reservation, merely preserving for a limited time in protected status individual Indian homesteads. The upshot of this indiscriminate approach would be to end the Reservation status of every Reservation that has ever been allotted—some four-fifths of the total.[9] While individual allotments held

[9] According to one compilation, of the 229 Indian Reservations existing in 1936 (which comprised approximately 136 million acres in 1887), only 48 (totalling about 22 million acres) escaped allotment and opening up. With the notable exception of the Navajo Reservation (encompassing some 16 million acres in 1936), most of the unallotted Reservations were relatively small. See J. Kinney, *A Continent Lost—A Civilization Won*, App. at 350 (table), 351-356 (table) (1937).

in trust or subject to restrictions would continue to be "Indian country" (see 18 U.S.C. (Supp V) 1151(b)), the territorial integrity of most Reservations would be destroyed, tribal governments would lose much of their reason for being, and all the problems associated with "checkerboard" jurisdiction would emerge.

To acquiesce in these results would break many solemn treaty promises made to the Indian, and, at this late date, the unsettling effect would be extreme. But the dispositive consideration is that reading an intent immediately to disestablish into every turn of the century statute providing for the allotment and opening up of Indian Reservations would attribute to Congress and the Executive a more callous disregard of Indian welfare than the record justifies. Latter-day popular history exaggerates when it portrays the Government of the United States as wholly captive to the "familiar forces" of the times, ready to take the Indian's land by any means and without concern for his fate. As this Court stressed in *Mattz* v. *Arnett*, 412 U.S. 481, 496 (1973), although elimination of separate Reservations was the *ultimate* goal, the actual consequence of allotment was often to "continue the reservation system" for a limited time. See, also, *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 478-479 (1976).

So, also, to hold that all Reservations opened up in this period were then permanently disestablished would trivialize the effect of the Indian Reorganization Act of 1934, 25 U.S.C. (& Supp. V) 461 *et seq.* (IRA), and more recent legislation, which radically changed our approach to Indian affairs. See, *e.g.*, *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151-158 (1973); *Mattz*, 412 U.S. at 496 & nn.17 and 18; *Moe*, 425 U.S. at 472-478; *Bryan* v. *Itasca County*, 426 U.S. 373, 388-389 n.14 (1976). Except as it is unavoidable, we ought not conclude that the remedy came too late for most Indians and most Reservations. This Court "cannot remake history." *DeCoteau* v. *District County Court*, 420 U.S. 425, 449

(1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 615 (1977). But, where implementation was not completed, the Court need not carry forward into the 1980s a policy so firmly repudiated by Congress since the 1930s. See *Moe*, 425 U.S. at 478-479.

This is not "revisionism." As early as 1884 this Court entertained "no doubt" that, until the lands opened to settlers were sold, the Indians remained the equitable owners and that such areas could not be deemed "public lands." *United States* v. *Brindle*, 110 U.S. 688, 693 (1884). A few years later, the reserved status of similar lands was held to defeat a state's claim to included school sections. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 394-402 (1902).[10] See, also, *United States* v. *Thomas*, 151 U.S. 577 (1894); *Wisconsin* v. *Hitchcock*, 201 U.S. 202 (1906). By 1909, the Court had established a presumption against termination or diminishment of Reservations and the elimination of the protective federal umbrella. *United States* v. *Celestine*, 215 U.S. 278, 285-287, 290-291; *United States* v. *Sutton*, 215 U.S. 291, 294-295. See, also, *Spalding* v. *Chandler*, 160 U.S. 394, 403-405 (1896). And, in the next three decades, there followed a host of decisions reflecting the same solicitude to maintain the special status of Indian land. *E.g.*, *Hollowell* v. *United States*, 221 U.S. 317 (1911); *Choate* v. *Trapp*, 224 U.S. 664 (1912); *Ex parte Webb*, 225 U.S. 663 (1912); *Donnelly* v. *United States*, 228 U.S. 243 (1913); *United States* v. *Mille Lac Band of Chippewas*, 229 U.S. 498, 509 (1913); *United States* v. *Sandoval*, 231 U.S. 28 (1913) (disapproving *United States* v. *Joseph*, 94 U.S. 614 (1877)); *United States* v. *Pelican*, 232 U.S. 442 (1914); *United States* v. *Nice*, 241 U.S. 591 (1916) (overruling *In re Heff*, 197 U.S. 488 (1905)); *United*

---

[10] Unlike some later opening legislation, the 1889 Act involved in *Minnesota* did not contain a special "school provision," stipulating outright purchase by the United States of Sections 16 and 36 and conveyance to the State. See n.14, *infra*.

States v. *Soldana*, 246 U.S. 530 (1918); *Ash Sheep Co.* v. *United States*, 252 U.S. 159 (1920); *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Ramsey*, 271 U.S. 467 (1926); *United States* v. *Chavez*, 290 U.S. 357 (1933); *United States* v. *McGowan*, 302 U.S. 535 (1938).

These early precedents make clear that the Court was adhering to a consistent approach when, more recently, it expressly affirmed the principle that allotment and opening up of tribal lands does not presumptively end the Reservation or reduce its boundaries. *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *Mattz* v. *Arnett*, *supra*; *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. at 478-479. That remains the rule today, as the Court summed it up in *DeCoteau*, 420 U.S. at 444:

> This Court does not lightly conclude that an Indian reservation has been terminated. "[W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States* v. *Celestine*, 215 U.S. 278, 285. The congressional intent must be clear, to overcome "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174, quoting *Carpenter v. Shaw*, 280 U.S. 363, 367. Accordingly, the Court requires that the "congressional determination to terminate * * * be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz* v. *Arnett*, 412 U.S., at 505. See also *Seymour* v. *Superintendent*, 368 U.S. 351, and *United States* v. *Nice*, 241 U.S. 591. In particular, we have stressed that reservation status may survive the mere opening of a reservation to settlement, even when the moneys paid for the land

> by the settlers are placed in trust by the Government. *Mattz* v. *Arnett, supra,* and *Seymour* v. *Superintendent,* supra.

See, also, *Rosebud,* 430 U.S. at 586-587 ("The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status."); cf. *United States* v. *John,* 437 U.S. 634 (1978).

To be sure, as *DeCoteau* and *Rosebud* illustrate, there are instances in which a Reservation must be found to have been irrevocably terminated or diminished. See pp. 14-17, *infra.* But the teaching of this Court over three-quarters of a century remains that such a finding requires very clear evidence of congressional intent to effect a present—and not merely an eventual—dissolution or dismemberment of the Reservation. In assessing that intent, we must of course be attentive to the contemporary understanding. But, again, it is essential to distinguish future expectations from immediate consequences.[11]

2. How then do we distinguish betwen action effectively ending the Reservation status of the whole or a part of recognized Indian lands and a mere opening up of such lands? As we have said, legislation enacted be-

---

[11] In this context, it is important to remember that the only parties to any cession were the Tribe and the United States. Future settlers, albeit intended beneficiaries, can claim only what the Congress secured, not some larger immunity they may have supposed would attach to their acquisition of surplus Indian land. At all events, the "legitimate expectations" of white settlers can be accommodated without destroying the Reservation status of opened areas. See *Montana* v. *United States,* 450 U.S. at 559-561 & n.9. But, whatever the equities may be in favor of individual holders of "fee" parcels who are challenging Reesrvation ordinances, no comparable claim can be asserted by the state and its counties. They plainly were not parties, directly or indirectly, to any agreement or legislation touching the status of the Reservation. The interest the states and counties now assert—seldom clearly articulated—cannot help us in determining the original understanding.

tween 1890 and 1910 was written, often carelessly, in the expectation that the entire Reservation system would be dismantled within a relatively short span. And it is equally clear that "Reservation status" for alienated lands was not yet a familiar concept.[12] Accordingly, we should not be surprised, in most cases, to find no express legislative discussion of Reservation status or Reservation boundaries as affected by opening up of tribal lands for sale to settlers. In the climate of the times, the only meaningful question is whether the legislation meant to accomplish a *present, unequivocal* and *irrevocable* transfer of Reservation lands from the Tribe to the United States.

a. In the treaty days, before 1871, such cessions were, of course, quite frequent. Even though part or even the whole of the "price" was often to be paid in installments (whether in money or in kind, or both) over several

---

[12] At the time, the usual focus was as to whether former tribal lands remained "Indian country" for purposes of exercising federal criminal jurisdiction and prosecuting violations of federal liquor law that were restricted to "Indian country." The prevailing view was that fully alienated tracts, including unrestricted allotments of tribal members, ceased to be "Indian country." *E.g., Bates* v. *Clark*, 95 U.S. 204 (1877); *Dick* v. *United States*, 208 U.S. 340 (1908); *Clairmont* v. *United States*, 225 U.S. 551 (1912). It was only in 1932 (Act of June 28, 1932, ch. 284, 47 Stat. 336 *et seq.*) that ceded rights-of-way across Reservations were included, and in 1948 (see 18 U.S.C. 1151(a)) that all lands within a Reservation, including those patented in fee, were declared "Indian country." The question of *tribal* jurisdiction over non-Indians on alienated parcels within the Reservation was not then a live issue, except in the case of the Civilized Tribes of the Indian Territory. There, however, tribal taxing authority over activities in alienated town sites was sustained. *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906). See, also, *Morris* v. *Hitchcock*, 194 U.S. 384, 392 (1904), citing with approval an Attorney General's opinion upholding tribal taxation of hay exports from the Reservation even if the non-Indian taxpayer were "the absolute owner of the land on which the hay was raised." This history is recounted in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 139-144 (1982).

years, the typical treaty cession leaves no doubt that the transfer was complete upon ratification. *E.g., United States* v. *Omaha Tribe of Indians*, 253 U.S. 275 (1920).[13] Like "cessions," expressly so termed, were subsequently accomplished by formal "agreement," incorporated in Acts of Congress. That was the form of the transaction by which the Black Hills were severed from the Great Sioux Reservation in 1877, and much other land in 1889. See Act of Feb. 28, 1877, ch. 72, 19 Stat. 254 *et seq.*; Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 *et seq.* Similar cession agreements effected the disestablishment of the North Half of the Colville Reservation and the termination of the Lake Traverse Reservation. See *Seymour*, 368 U.S. at 355; *DeCoteau*, 420 U.S. at 455; *id.* at 455-460 (App. A to opinion). And there are many other instances. See, *e.g., Mattz*, 412 U.S. at 504 n.22; *DeCoteau*, 420 U.S. at 439-440 n.22. See, also, the Act of June 6, 1900, ch. 813, 31 Stat. 672 *et seq.*, upheld in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).

Sometimes, to be sure, the purported "agreement" had not been approved by the requisite number of tribal members stipulated in an earlier treaty, or consent had been induced by questionable methods. *E.g.*, the case of the Black Hills, discussed in *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 381-382 & n.13 (1980). But, in light of *Lone Wolf*, that is irrelevant to our inquiry. The critical fact in all these cases is that Congress exacted a *present and total surrender of all tribal interest* in the ceded land in return for an *unconditional commitment* by the United States to an agreed payment, even if inade-

---

[13] Even then, there were exceptions. Some treaties provided for payment of "ceded" lands, at least in part, by turning over to the Tribe the proceeds of sale received from settlers. In such cases, the Court characterized the cession as incomplete until the tracts were sold, holding that the Indians remained the equitable owners and that the ceded area should not be deemed "public lands." *E.g., United States* v. *Brindle, supra.*

quate or delayed. Although, usually, the Government immediately opened the area to settlers, the Indians, having irrevocably and completely divested themselves of title for a fixed price, had no interest in those subsequent events.

b. On the other hand, during the decade preceding and especially that following 1900, there were more numerous arrangements under which the United States, with or without the formal concurrence of the Tribe, opened up tribal lands to sale without any firm obligation to do more than credit or pay over the proceeds to the Tribe when realized.[14] In effect, the Government was a mere sales agent. No doubt, the primary motive for resorting to this type of scheme was to avoid committing the United States to any independent financial obligation.[15]

---

[14] There was, commonly, a special exception for "school sections" within the opened area, which were purchased outright by the United States and conveyed to the state. See, *e.g.*, Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352 *et seq.*, quoted in the following note. But, as *Ash Sheep* makes clear, such a provision has no effect on the continuing Indian status of the remaining lands opened up. See pp. 17-19, *infra*. The Court reiterated this view as recently as *DeCoteau*, 420 U.S. at 445-446 n.33: a "school provision" of this kind "implies nothing about the presence or absence of state civil or criminal jurisdiction over the remainder of the ceded lands." A sufficient example is the Crow Allotment Act of June 4, 1920, ch. 224, § 16, 41 Stat. 756, which provided for the purchase by the United States and grant to the State of Montana of Sections 16 and 36 within the Crow Reservation. No one has ever contended that this legislation affected the status or boundaries of the Reservation. See *Montana* v. *United States*, 450 U.S. at 548. Since Montana was admitted by the same Enabling Act as South Dakota, we must assume the Court was misled in *Rosebud* in suggesting that implementation of an Enabling Act school section grant within Indian country implies disestablishment of the affected portion of the Reservation. See 430 U.S. at 599-601. In our view, *DeCoteau* correctly concluded that a school section provision is wholly neutral on the issue of disestablishment.

[15] An express statement of this concern is reflected in Section 8 of the Crow Agreement, incorporated in the Act of Apr. 27, 1904, ch. 1624, 33 Stat. 361, quoted in *Ash Sheep*, 252 U.S. at 165-166:

And it was presumably anticipated that, in due time, all tracts would be sold and that the upshot would be the same as in the case of a straightforward cession. But, until that day, the transfer was incomplete.

Unsurprisingly, the clear line between outright cession and mere opening up of tribal lands was not always observed. As *Rosebud* illustrates, Congress sometimes combined features of both schemes in a given case. Thus, the 1904 Act affecting a portion of the Rosebud Sioux Reservation grew out of a straightforward cession agreement with the Tribe, but the payment provisions were transmuted by the Congress so as to resemble a typical opening up arrangement. See 430 U.S. at 590-598. In part because the immediate cession language was retained in the first statute (*id.* at 591, 596-597) and because the later Acts of 1907 and 1910 were seen as derivative legislation, carrying forward the same "baseline" objective (430 U.S. at 605-615), the Court concluded that an intent immediately to diminish the Reservation must be found. But we do not read *Rosebud* as erasing the traditional distinction.[16] The rule of *Seymour* and *Mattz* has not

---

That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend any pay over the proceeds received from the sale thereof only as received, as herein provided.

This was a standard provision in opening up legislation, including the 1908 Act now before the Court. See Pet. Br. App. A14-A15.

[16] Notwithstanding what was written in *Rosebud*, 430 U.S. at 613-614 & n.47, we fail to appreciate the significance for Reservation status of a provision prohibiting the introduction of liquor into an "opened" area for twenty-five years—at least when, as there and here, it encompasses "land allotted, those retained or reserved," as

been repudiated and presumably continues to govern in any like situation.

3. The immediate consequences of opening up legislation not involving an unconditional present cession are clear enough. Putting aside allotments selected in the opened area and any school sections purchased outright for the state, the Tribe retained its beneficial title to the land until sold, as well as the right to any profits derived from their use. Only Indian occupancy rights were suspended—so that the land could be offered, more invitingly, with "vacant possession." In sum, as this Court repeatedly held in a series of cases including *Brindle, Mille Lac Band of Chippewas, Minnesota* v. *Hitchcock* and *Ash Sheep*, while unsold, such opened lands remained Indian

---

well as "surplus land sold, set aside for town-site purposes, granted to the State * * * or otherwise disposed of." See Act of May 30, 1910, ch. 260, § 10, 36 Stat. 451 (Rosebud Act); Act of Feb. 17, 1910, ch. 40, 36 Stat. 196 *et seq.*, amending Section 8 of the 1908 Act before the Court (Pet. Br. App. A18-A20). Under the Act of July 23, 1892, ch. 234, 27 Stat. 260 *et seq.*, as amended by the Act of Jan. 30, 1897, ch. 109, 29 Stat. 506 *et seq.*, the prohibition already applied to all restricted allotments whether or not within a Reservation, but, at least by clear implication, did not cover unrestricted allotments or alienated parcels even inside a Reservation. See *United States* v. *Sutton*, 215 U.S. at 293. See also, n.12, *supra*. Indeed, that is the general rule today with respect to "non-Indian communities" within Reservations. 18 U.S.C. 1154(c); see *United States* v. *Mazurie*, 419 U.S. 544 (1975). It follows that the provisions in the 1910 statutes quoted above were redundant with respect to allotments (until the restrictions were removed), but important as they affected alienated lands, even if the Reservation boundaries remained unchanged.

Again, the point is illustrated by the Crow Allotment Act of 1920, which, in Section 9 (41 Stat. 754), extended the liquor prohibition to fee tracts within the Reservation (including unrestricted allotments held by Indians, lands alienated to others, and state school sections)—an action which no one has suggested disestablished or changed the boundaries of the Crow Reservation. So, also, a like statute covering the Colville Reservation did not affect the result in *Seymour*. See Act of Aug. 31, 1916, ch. 424, 39 Stat. 678 *et seq.*, noticed by the Court, 368 U.S. at 356 n.12.

for most purposes. The last decision states the situation aptly (252 U.S. at 165-166):

> It is obvious that the relation thus established by the act between the Government and the tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the *cestui que trust*. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 394, 398 * * *.
>
> Taking all of the provisions of the agreement together we cannot doubt that while the Indians by the agreement released their possessory right to the Government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, and that they did not become "Public lands" in the sense of being subject to sale, or other disposition, under the general land laws. *Union Pacific R.R. Co.* v. *Harris*, 215 U.S. 386, 388. They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904, 33 Stat. 352, and as to this point the case is ruled by the *Hitchcock* and *Chippewa Cases*, *supra*. Thus, we conclude, that the lands described in the bill were "Indian lands" * * * [17]

---

[17] Usually, the lands "opened" under this type of legislation were not simply made available to all comers under the provisions of the general public land laws; rather, their disposition was governed by special conditions, typically involving classification and appraisal, installment payments, and, if no purchasers appeared after seven years, sale at public auction. A common provision expressly stipulated that "no person shall be permitted to settle upon, occupy, or

It is plain that the continuing tribal interest in the lands opened under these arrangements was not merely a right of reversion in the event the lands were never sold and the Government continued to decline to purchase them itself. There was not a completed sale, subject only to a condition subsequent. Nor was the Government "taking" the land without payment, exposing itself to an obligation, in due course, to make "just compensation" out of Treasury funds if settlers failed to provide the price. Compare *United States* v. *Sioux Nation of Indians, supra.* Indeed, the Congress expressly excluded that possibility. See n.15, *supra.* The transfer was, rather, an incomplete transaction, held in abeyance until payment should be received from homesteaders. For the time being, the Indians' possessory rights were suspended, but that is all. And, at some point, if the scheme failed for lack of purchasers, the Tribe's right to resume occupancy presumably must be conceded—even without the benefit of "restoration orders" under the Indian Reorganization Act of 1934.[18] In the interim, the Indians' title had survived

---

enter any of said lands except as prescribed in [the President's] proclamation." *E.g.*, Sections 2-5 of the 1908 Act (35 Stat. 461-463) involved here, Pet. Br. App. A4-A12. And, of course, the proceeds of sale did not go to the Treasury as unrestricted moneys, but were required to be credited to the Tribe, with interest. *E.g.*, Section 6 of the same Act (35 Stat. 463), Pet. Br. App. A12. Obviously, this was a far cry from simply "restoring" the area unconditionally to the "public domain."

We note that the statutes involved in *Ash Sheep* and *Minnesota* v. *Hitchcock* incorporated agreements with the Tribe which purported to "cede" the lands that were to be opened to sale. But the Court looked to the substance of the transaction, not the terminology, and concluded that the "cession" was conditional, in effect suspended until and unless sales to settlers were realized. *A fortiori*, that must be the result where no agreement and no words of cession are present.

[18] Section 3 of the IRA, 25 U.S.C. 463, authorized the Secretary of the Interior "to restore to tribal ownership the remaining surplus lands of any Indian reservation [heretofore] opened." Since legal title was to reman with the United States and the Tribe had never

and there was no basis for altering the Reservation boundaries.[19]

The early cases, it is true, dealt only with *unsold* "surplus" lands. But, given that these retained their Reservation status—even if partially suspended—it would be incongruous to conclude that new boundaries should be drawn, in a crazy-quilt pattern, to exclude alienated parcels after Congress determined that they, also, should be deemed "Indian country." 18 U.S.C. (Supp. V) 1151(a). At all events, that is what this Court squarely decided in *Seymour* and re-affirmed in *Mattz*.

4. There is a final caveat. In cases where the opened area of a Reservation was entirely—or almost entirely—sold off to non-Indian settlers before the process was halted by the change of policy enacted in 1934, it may well be right to treat the Reservation as diminished today. This is not merely a bow to current reality. Nor is

---

lost beneficial title, the practical effect of restoration orders under this provision was to return *use and occupancy rights* to the Tribe. As the Senate Report accurately recited, Section 3 of the IRA was intended to restore unsold "surplus" tracts "to tribal use." S. Rep. 1080, 73d Cong., 2d Sess. 2 (1934). Stated differently, restoration orders ended the suspended status of such areas. As we have said, that result must have occurred sooner or later if the surplus lands remained unsold for a very extended period. But the IRA and the restoration orders issued under it serve the useful function of mooting the question whether, in a given case, lapse of time had already effectively ended the "opening" of tribal lands. Plainly, such restoration orders are not evidence that the Reservation status of the affected lands had been irretrievably lost. *See-Rosebud*, 430 U.S. at 604 n.27.

[19] It is worth noting that Interior Department Regulations promulgated in 1912 "contemplated that remaining surplus lands, the proceeds of the disposal of which were for the benefit of the Indians, would be cooperatively administered by the Indian Office and the General Land Office, the Indian Office retaining jurisdiction of the use of the lands before they were sold and the General Land Office administering the final disposition of the lands." See 56 Interior Dec. 330, 339 (1938).

it an impermissible attempt to construe turn of the century legislation in accordance with unpredictable future events. On the contrary, we reasonably may suppose that the sponsors of "opening up" legislation would have intended to end the Reservation status of the affected area *if and when* their expectations were fully realized, but not otherwise.[20] Then, as now, it must have seemed artificial to continue to treat as part of an Indian Reservation a discrete area, typically of large dimensions, once both land ownership and population had ceased to be Indian. Per contra, where no present cession was involved and disappointingly few settlers had taken up Congress's invitation, there was, and is, no justification for jurisdictionally separating from the Reservation "core" an adjacent tract that remains significantly Indian in every respect.

All else aside, this explains the result in *Rosebud*. As the Court there stressed, of the more than 2 million acres opened up by the Acts of 1904, 1907 and 1910, only some 4,600 remained unsold in 1938. 430 U.S. at 588 n.3. And, today, more than 90% of the opened area is non-Indian, both in population and land use. Id. at 605. In these circumstances, it was obviously difficult to conclude that Congress would have wished the affected area to retain Reservation status. At some point, the tail can no longer wag the dog.[21]

---

[20] Where allotments, normally restricted for 25 years, were provided for in the opened area, it would be reasonable to suppose that the "Indian" character, or "Reservation status," of that area was intended to lapse at the end of the 25-year period—which also coincided in some cases with the time when the liquor prohibition would cease—assuming that, by then, the surplus lands also had been fully disposed of. See *Mattz*, 412 U.S. at 496.

[21] This likewise explains the ultimate redrawing of Reservation boundaries to exclude the opened area of the Red Lake Reservation considered in *Minnesota* v. *Hitchcock*, and the area of the Crow Reservation affected by the 1904 Act involved in *Ash Sheep*. In both cases, almost all the unallotted land in the opened portion of

So saying, we imply no "majority rule" under which the status of opened tribal lands depends upon whether more or less than half the acres, or the population, remain Indian. One of the familiar consequences of the allotment policy is that, as a result of numerous exceptions to the restrictions on alienation, much of the acreage of even the unopened portion of some Reservations is today in non-Indian hands. *E.g., Montana* v. *United States*, 450 U.S. at 548 (Crow Reservation); *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 3. So, also, the concentration of a large non-Indian population in a few alienated town sites within a Reservation sometimes left the Indians grossly outnumbered. *E.g., Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 470 (1979). Since these disparities do not affect the status of the Crow Reservation, the Quinault Reservation, or the Yakima Reservation, there is no cause to treat like patterns of land ownership or population as inconsistent with Reservation status for once opened areas. It is only when the Indain character of former tribal lands is wholly destroyed that it seems justifiable to sever the area from the Reservation.

B. The 1908 Act

Applying the principles just outlined to the case before the Court yields a clear conclusion against diminishment of the Cheyenne River Reservation. The points are quickly stated.

1. First and foremost, the 1908 Act involved here is typical opening up legislation, of a piece with the statutes considered in *Seymour* and *Mattz*. There was no present

---

the Reservation was sold before 1934. See *United States* v. *Holt State Bank*, 270 U.S. 49, 52-53 (1926). In the case of the Crow Reservation, only some 10,000 acres (out of a total of more than 1 million acres) in the area opened by the 1904 Act remained unsold, as attested by the "restoration" Act of May 19, 1958, Pub. L. No. 85-420, 72 Stat. 121.

cession for an agreed price, but, instead, an arrangement whereby the Government—expressly avoiding any obligation to buy itself—undertook to sell tribal lands to settlers for the account of the Tribe. No language of cession is to be found, nor any other terms "precisely suited" to disestablishment. Indeed, there was no prior agreement with the Tribe.

The basic character of the congressional action is perfectly clear. It cannot be changed into an immediately effective cession merely because the drafters carelessly spoke of the unopened portion of the Reservation as "diminished" in one place (§ 2 (35 Stat. 461); Pet. Br. 19-20), and, in another (§ 9 (35 Stat. 464); Pet. Br. App. A16), to the opened area as "part of the public domain." These were, of course, half-truths. Except for any allotments selected in the territory opened to settlers, the area of Indian occupancy *was* diminished temporarily; and, ultimately, if all went as expected, the Reservation would be permanently reduced in size. Similarly, although the opened area could not accurately be assimilated to the "public domain" because it remained encumbered by tribal equitable ownership and was only made available to settlers on special conditions,[22] those lands were, for the time being, given some of the attributes of "public lands."[23]

At all events, such convenient short-hand references to the two portions of the Reservation cannot overcome the detailed provisions of the statute. Cf. *Mattz*, 412 U.S. at 498. Knowing the true nature of the arrangement, we cannot be misled by a wrong label. In all essential re-

---

[22] See n.17, *supra*.

[23] The "surplus lands" were, after all, opened to entry under some of the "public land laws," albeit with significant qualifications. Perhaps the most useful short-hand description of unsold "surplus" lands opened to sale is that given by the Interior Department Solicitor in 1938 (56 Interior Dec. at 338): "qualified public lands and also qualified Indian lands."

spects, the 1908 Act is indistinguishable from the statutes examined in *Seymour* and *Mattz* and the consequences should be the same.[24]

2. Resort to legislative history gives no different answer. To be sure, the Indians were briefly consulted as to their willingness to part with the area to be opened. Since it was anticipated that purchasers would be found for all the lands, the Government representative quite understandably did not advert to the legal status of the area in the event that expectation was disappointed. And it is equally unsurprising that tribal spokesmen did not discuss that eventuality. Interestingly, one tribal leader preferred to have the Government "buy [the surplus lands] outright," fearing that "it [would] take years for all of the land to be disposed of." Pet. Br. App. A153. He was firmly told that a "lump sum" payment was impossible because "Congress will not accept anything of that kind." Pet. Br. App. A158. Nevertheless, the Indians presumably believed that white men wanted the land and would buy it sooner or later, and that, except for allotments, the entire area would be taken. Given that premise, there is nothing in the minutes of the truncated Indian meetings held by Inspector McLaughlin or in his report that casts useful light on our question.

---

[24] The Act of Mar. 22, 1906, ch. 1126, 34 Stat. 80 *et seq.*, considered in *Seymour*, is identical to the present statute except that (1) it does not contain a "school section" provision or one prohibiting the introduction of intoxicants, and (2) it provided for sale, rather than reservation of minerals on the opened tracts. As we have already noted, the first difference is irrelevant to our inquiry. The second, on the other hand, cuts in favor of continued Reservation status here.

The Act of June 17, 1892, ch. 120, 27 Stat. 52 *et seq.*, considered in *Mattz*, is much more abbreviated. If anything, it is more susceptible to being construed as a "termination" statute because the opened lands are made available under the land and mineral laws *without condition*. This was more arguably a "restoration to the public domain" than can be found in the 1908 Act now before the Court.

What is relevant, however, is that, at the end of the day, no cession resulted. The Tribe, told it had no real option in light of *Lone Wolf*, mostly listened and never fully acquiesced in the opening arrangment. See, *e.g.*, Pet. Br. App. A124-A125, A127-A129, A141, A145-A146, A152, A161.[25]

Nor do the congressional debates and reports offer more. Again, although the Congress was careful not to commit itself to any payment from the Treasury (except for school sections), the prevailing optimism foreclosed any discussion of the consequences if homesteaders did not come forward in sufficient numbers. In these circumstances, no significance can be attached to a reference to the Reservation in one Committee Report as "diminished" (Pet. Br. App. A28). Indeed, another Report speaks of surplus lands "on the Cheyenne River and Standing Rock Indian reservations" (Pet. Br. App. A21, A36).

Finally, an amending statute of 1910 is invoked (Pet. Br. App. A17-A20). Reinstating the figure recommended two years earlier, that legislation increased (from $1.50 to $2.50 per acre) the price to be paid for the school sections, and, accordingly, made a larger appropriation for that purpose. See S.D. Counties' Br. App. C1-C51. Beyond this, the 1910 Act subjected the entire original Reservation to existing laws prohibiting the introduction of intoxicants into Indian country (Pet. Br. App. A19-A20). For the reasons already given (n.16, *supra*), we cannot construe this action as bearing on the issue of diminshment or disestablishment. At all events, this later statute, enacted *at the request of the Tribe*, can hardly

---

[25] In fact, one of the few tribal leaders present asked for more time to consider the matter in full Council and was cavalierly told to communicate the Tribe's views to the Agency Superintendent, who must forward them to reach Washington within two weeks. See Pet. Br. App. A50, A161. Unsurprisingly, no such communication was received before Inspector McLaughlin submitted his report. Pet. Br. App. A50-A51.

affect what is claimed to have been a present cession two years earlier. See S. Rep. 518, 61st Cong., 2d Sess. 3, 5 (1910).

3. The subsequent history, as in most like cases, is confused and rife with inconsistencies. See *Seymour*, 368 U.S. at 356 n.12; *Mattz*, 412 U.S. at 484-485; *DeCoteau*, 420 U.S. at 442-444; *Rosebud*, 30 U.S. at 603-605. For the most part, it is no more reliable here than elsewhere in deciding the diminishment issue. Nevertheless, we may notice two points.

From the first, there were references to the opened area as a continuing part of the Reservation, both in Acts of Congress,[26] congressional reports and debates,[27] and executive documents.[28] So, also, the approved tribal constitution of 1935 gave the Tribe jurisdiction over the whole undiminished Reservation. See Pet. Br. 60.

Nor is the early jurisdictional history as one-sided as petitioners suggest. To be sure, in *United States* v. *La Plant*, 200 F. 92 (D.S.D. 1911), a district court, on questionable reasoning, declined jurisdiction of a homicide

---

[26] *E.g.*, the Act of June 23, 1910, ch. 369, 36 Stat. 602, authorizing the sale to a railroad of a tract in the opened area described as "in the Cheyenne River Reservation"; and Section 2 of the Act of Mar. 4, 1921, ch. 174, 41 Stat. 1447, permitting extension of time for payment of installments due by purchasers of land "in the Cheyenne River Reservation."

[27] *E.g.*, H.R. Rep. 1046, 61st Cong., 2d Sess. (1910); S. Rep. 723, 61st Cong., 2d Sess. (1910); H.R. Rep. 315, 62d Cong., 2d Sess. (1912); S. Reps. 209 and 216, 62d Cong., 2d Sess. (1912); 45 Cong. Rec. 5799-5810 (1910).

[28] References to the opened lands as "in" or "within" the Reservation occur in the President's opening Proclamation (38 Interior Dec. 157 (1909)), an Indian Department Order relating to selection of school sections (38 Interior Dec. 455 (1910)), and others extending the time for payment by purchasers (48 Interior Dec. 80 (1921); 49 Interior Dec. 131 (1922)).

by one non-Indian against another in the opened area,[29] and the State occasionally filled the void. But prosecutions by either sovereign, then as now, were rare, and, in fact, many civil and criminal matters continued to be handled by tribal and federal authorities within the opened lands. See *Hoxie Report* 100-108, 108-118.[30] In other respects, the United States remained the civilian administrator of the entire original Reservation, including the unsold lands. *Hoxie Report* 71-81, 87-93.

4. In our view, these facts are of secondary relevance. What is dispositive here, it seems to us, is that the opening up experiment in large measure failed, so that today the disputed area retains an important Indian character. As we have said, even though no immediate disestablishment was accomplished by enactment of the 1908 Act, that result might well have later occurred if settlers had, as expected, acquired all, or almost all, the opened lands—as was the case in *Rosebud*. But no such implied diminishment can be found when, as here, the Tribe's title to most of the opened land survived and has been formally "restored" by Interior Department orders.[31]

---

[29] At the time, a special statute (Act of Feb. 2, 1903, ch. 351, 32 Stat. 793) provided—contrary to *United States* v. *McBratney*, 104 U.S. 621 (1882)—that, regardless of the race of the offender and the victim, certain enumerated crimes were within federal jurisdiction if committed on any "Indian Reservation" in South Dakota. Accordingly, the court in *La Plant should* have focused on whether the opened area of the Cheyenne River Reservation had been disestablished. In fact, however, the court based its ruling on a finding—erroneous in light of *Ash Sheep*—that Indian title had been extinguished by the 1908 Act as to unsold tracts. See 200 F. at 94-95.

[30] F. Hoxie, *Jurisdiction on the Cheyenne River Indian Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908* (undated manuscript) [hereinafter cited as *Hoxie Report*]. This report was part of the record in *United States* v. *Dupris*, *supra*, and was incorporated as part of the record in the instant case, now transmitted to this Court.

[31] The area opened by the 1908 Act comprises approximately 1.6 million acres. By the time of the opening Proclamation of August

Indeed, unless the question was irrevocably settled in 1908, it is difficult to attribute to anyone—including the Congress of 1908—an intent to treat as no longer part of the Reservation an area which includes the tribal capital, the Indian Agency and the major Indian town, within which some two-thirds of tribal members reside (outnumbering non-Indians there), and where almost half the areage is Indian owned. Common sense rebels against that result.

What is more, compelling such a complex pattern, in a case like this one, defeats more recent congressional policy and unnecessarily creates jurisdictional problems. In 1934, implementing the Indian Reorganization Act, the Secretary of the Interior halted all further sales of "opened lands," including those on the Cheyenne River Reservation. See 54 Interior Dec. 559, 561, 563-564 (1934).[32]

19, 1909, almost 400,000 acres in that area had been allotted to tribal members, and some 133,000 acres were subsequently allotted there. *Hoxie Report* 38, 88. After deducting some 90,000 acres for state school sections, this left about 1 million acres open to homesteaders. But it appears that relatively few entries were perfected, in large part because the extravagant promise of the "boosters," having got the settlers in, could not keep them there. See *Hoxie Report* 66-67. The restoration orders, affecting unsold tracts in the opened portion of the Reservation, cover all but one of the 78 townships that are embraced in whole or in part within the opened area. See 6 Fed. Reg. 3300 (1941); 14 Fed. Reg. 471 (1949); 17 Fed. Reg. 1065 (1951); 22 Fed. Reg. 3693 (1957); 30 Fed. Reg. 15588 (1965); 32 Fed. Reg. 14276 (1967). Although the actual acreage of the unsold lands affected by the major "restorations" of 1941 and 1951 (6 Fed. Reg. 3300 and 17 Fed. Reg. 1065) is not given, the detailed exclusion of tracts as small as a sixteenth of a section and individual townsite lots suggests that most of the remaining unallotted land was unsold. But, as on many other Reservations, a large number of allotments fell into non-Indian hands and this accounts for a substantial part of the "fee" holdings now existing in the former opened area. Nevertheless, today, almost half the opened area remains in Indian ownership, all of it, with minor exceptions, in trust or restricted status.

[32] On September 19, 1934, the Secretary of the Interior approved the recommendation of the Commissioner of Indian Affairs, joined

Most of the unsold area was "restored" to the Tribe in 1941 (6 Fed. Reg. 3300) and 1951 (17 Fed. Reg. 1065), smaller tracts in other years (14 Fed. Reg. 471 (1949); 22 Fed. Reg. 3693 (1957); 30 Fed. Reg. 15588 (1965); 32 Fed. Reg. 14276 (1957)). As the South Dakota Counties (Br. 46-47 & n.16) are at pains to point out, these orders expressly declared the restored acreage "part of the existing reservation." [33] Thus, it is common ground that much of the disputed area is today not merely "Indian country," but an integral portion of the Cheyenne River Reservation. In light of the congressional decision

---

by the Commissioner of the General Land Office, that all unsold lands within the opened areas of Indian Reservations be temporarily withdrawn from sale with a view to "restoration" under Section 3 of the IRA—specifically including lands covered by the 1908 Act involved here. 54 Interior Dec. at 561-562, 563. This order was later amended to cover three further opened Reservations and to embrace unsold lots in townsites. *Id.* at 563-564. It is to be noted that, at the time, the Department's view was that restoration orders under Section 3 could only reach lands "usually referred to as surplus lands of Indian reservations." *Id.* at 560. Four years later, to be sure, it was held that lands "cut off" from Reservations, but as to which Indian beneficial title had not been extinguished, were equally subject to restoration under Section 3. 56 Interior Dec. 330, 333 (1938). But that does not impugn the opinion given in 1934 that the Cheyenne River Reservation was not diminished by the 1908 Act. At all events, it is clear that, at all times, the Department viewed "restored" lands as enjoying "Reservation status" thereafter. See 56 Interior Dec. at 333.

[33] Petitioners and those who support them argue that, because restoration orders invoked both Section 3 and Section 7 of the IRA (25 U.S.C. 463, 467), they should be construed as "adding" to the Reservation lands which had previously lost that status. But there is no stronger reason to take that view here than in respect of a similarly worded "restoration," by Act of Congress, in the case of the Colville Reservation. See *Seymour*, 368 U.S. at 356. As previously noted (n.18, *supra*), such orders are ambiguous on the interim status of surplus lands. But no one disputes the validity or effectiveness of those restoration orders as confirming or granting Reservation status to the "restored" lands for the future. See n.32, *supra*.

in 1948 to give like status to allotted and alienated tracts within a Reservation, it is hardly consistent to draw Reservation boundaries in the opened area in "checkerboard" fashion so as to include only restored lands.

In our submission, every consideration argues for the obvious alternative: the Cheyenne River Reservation was not immediately diminished in 1908, and, notwithstanding the expectations of all concerned, the opened area survived as part of the Reservation. That solution is both practical and faithful to the intent of Congress. And it follows the Court's rule that only the clearest directive will destroy the protective shield of Indian Reservation status.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Acting Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

DAVID C. SHILTON
JANET L. STECKEL
Attorneys

OCTOBER 1983

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 92-6281

ROBERT HAGEN, PETITIONER

v

STATE OF UTAH

On Writ of Certiorari to the Supreme Court of Utah

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case involves the boundaries of the Uintah Indian Reservation. The location of the boundaries affects the scope of the law enforcement obligations and powers of the United States under the Indian Major Crimes Act, 18 U.S.C. 1153, and other federal statutes that apply only in Indian country. Moreover, because of the United States' special relationship with the Indian Tribes, we have a strong interest in the development of sound principles for determining when a reservation has been diminished or extinguished.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Act of May 27, 1902, ch. 888, 32 Stat. 245, and the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, are reprinted in an appendix to this brief.

STATEMENT

1. On October 3, 1861, President Lincoln established an Indian Reservation along a river in the Territory of Utah then known as the Uinta, but now referred to as the Duchesne.[1] Executive Order No. 38-1, *reprinted in* 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 900 (1904). Congress confirmed the President's action in 1864, providing that the land in question was "set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of [the Utah] territory as may be induced to inhabit the same." Act of May 5,1864, ch. 77, § 2, 13 Stat. 63.

Before the end of the nineteenth century, however, the Uintah Indian Reservation—like many others—became the subject of the "familiar forces" brought to bear by "the desire of non-Indians to settle upon reservation lands." *DeCoteau* v. *District County Court*, 420 U.S. 425, 431-432 (1975). Those forces led to the passage in 1887 of the General Allotment Act, which granted the President authority "to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit." *DeCoteau*, 420 U.S. at 432 (citing Act of Feb. 8, 1887, ch. 119, 24 Stat. 388).

The first significant step in the move toward allotment of the Uintah Indian Reservation came in 1894, when Congress directed the President to appoint a commission to negotiate with the Indians on the Reservation for the acceptable of allotments and "the relinquishment to the United States of the interest of said Indians in all [unallotted lands]." Act of Aug. 15, 1894, ch. 290, § 22,

---

[1] Another river now referred to as the Uinta is a tributary of the Duchesne that flows near the eastern boundary of the original Reservation before entering the Duchesne near the southeastern corner of the original Reservation.

28 Stat. 337.[2] Because the matter was not resolved promptly,[3] Congress in 1898 again directed the Secretary to appoint a commission to negotiate an agreement for allotment of Uintah Indian Reservation lands and "cession to the United States" of unallotted lands. Act of June 4, 1898, ch. 376, §§ 1-2, 30 Stat. 429. When the Indians resisted, Senator Rawlins of Utah introduced a series of bills that would have opened the Reservation unilaterally. S. 4867, 55th Cong., 3d Sess. (1898); S. 93, 56th Cong., 1st Sess. (1899); S. 145, 57th Cong., 1st Sess. (1902) (*reproduced in* S. Doc. No. 212, 57th Cong., 1st Sess. 3-4 (1902)); see S. Doc. No. 212, *supra*, at 4-6 (discussing resistance of Indians). Those bills, however, were not enacted.

Instead, in 1902, Congress passed an Act providing that if a majority of the adult male members of the Uintah and White River Indians consented, the Secretary of the Interior should make allotments by October 1, 1903, out of the Uintah Indian Reservation.[4] The allotments were to be in the amount of 80 acres to each head of a family and 40 acres to each other member of the Tribes. Act of May 27, 1902, ch. 888, § 1, 32 Stat. 263-264 (1902 Act). The 1902 Act also provided that when the October 1, 1903, deadline for allotments passed,

---

[2] In 1888, Congress had restored to the public domain a 7,040-acre triangle on the eastern edge of the Uintah Reservation, commonly referred to as the "Gilsonite Strip," because of the deposits of gilsonite found on that tract. Act of May 24, 1888, ch. 310, 25 Stat. 157-158. The status of the Gilsonite Strip is not at issue in this case.

[3] Negotiations with the Uintah Reservation Indians were delayed because of difficulties encountered in negotiating with the Indians on the neighboring Uncompahgre Reservation. See S. Doc. No. 32, 55th Cong., 1st Sess. 2-3 (1897).

[4] The Ute Indian Tribe participating as an amicus in this case includes the descendants of those Indians; it consists of the Uintah, Uncompahgre, and White River Bands of Indians. See Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation 1 (1937).

"all the unallotted lands within said reservation shall be restored to the public domain," and that those lands would be subject to entry under the homestead laws, at a rate of $1.25 per acre. 32 Stat. 263. Finally, the 1902 Act provided that the net proceeds of the sale of lands restored to the public domain, "under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians." 32 Stat. 264.[5]

The allotments did not, however, proceed as provided for by the 1902 Act. Accordingly, Congress in 1903 directed the Secretary to allot the land unilaterally if the Indians did not give their consent by June 1 of that year. Act of Mar. 3, 1903, ch. 994, § 1, 32 Stat. 997-998. That Act also extended the time for the "opening [of] the unallotted lands to public entry on said Uintah Reservation" until October 1, 1904. 32 Stat. 998. When the Indians continued to oppose the plan,[6] Congress again deferred the opening date, to March 10, 1905. Act of Apr. 21, 1904, ch. 1402, § 1, 33 Stat. 207-208.

By the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048 (1905 Act), Congress again deferred the time for opening the unallotted lands to public entry, this time to September 1, 1905, unless the President determined that the lands should be opened at an earlier date. Section 1, 33 Stat. 1069. The March 1905 Act then specified "the

---

[5] A month later, Congress supplemented the 1902 Act with a provision requiring the Secretary.

> [i]n addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, * * * [to] select and set apart for the use in common of the Indians of that reservation such an amount of non-irrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

J. Res. 31, 57th Cong., 1st Sess., 32 Stat. 744 (1902).

[6] Only 82 of the 280 adult male Indians eligible to vote approved the transaction. See H.R. Doc. No. 33, 58th Cong., 1st Sess. 5 (1903).

manner of opening such lands for settlement and entry, and for disposing of the same." *Ibid.* Specifically, it provided that the unallotted lands (except for such tracts as might be set aside as a national forest service, and certain mineral lands disposed of in 1902) "shall be disposed of under the general provisions of the homestead and townsite laws of the United States." *Ibid.*[7] All lands "opened to settlement and entry under this Act remaining undisposed of [within five years]" were to "be sold and disposed of for cash, under rules and regulations * * * prescribed by the Secretary of the Interior." 33 Stat. 1070. The proceeds of the sale of unallotted lands were to be applied, in accordance with the 1902 Act, for the benefit of the Indians. 1905 Act, § 1, 33 Stat. 1070.

The government failed to obtain the consent of the Indians to the arrangement. Nevertheless, President Roosevelt issued a Proclamation on July 14, 1905, which declared that "the unallotted lands in [the Uintah Indian] Reservation * * * will on and after the 28th day of August, 1905, * * * be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States." 34 Stat. 3120.[8]

---

[7] The 1905 Act also authorized the President, before opening the reservation to entry, to set aside additional lands for the Uintah Forest Reserve that had been established adjacent to the Reservation in 1897, as well as for reservoir and other water-supply purposes. 33 Stat. 1070.

[8] On the same day, President Roosevelt, acting pursuant to the 1905 Act, see note 7, *supra*, set aside about 1,010,000 acres within the Reservation as an addition to the Uintah Forest Reserve. 34 Stat. 3116. In 1931, Congress appropriated $1,217,221.25 to compensate the Indians for 973,777 acres of those lands, at the rate of $1.25 per acre. Act of Feb. 13, 1931, ch. 124, 46 Stat. 1092-1093. Congress compensated the Indians for the remainder of the forest reserve lands in 1956 by restoring to the Indians the title to the mineral resources on those remaining lands. Act of July 14, 1956, ch. 603, 70 Stat. 546. Pursuant to the 1905 Act, see note 7, *supra*, the President also withdrew certain lands for reservoir purposes, by proclamations issued on August 3 and August 14, 1905. 34

2. In 1989, petitioner was charged with distribution of a controlled substance in the District Court of Duchesne County in Utah. The offense occurred in the town of Myton, which lies within the original exterior boundaries of the Uintah Indian Reservation, in an area that was opened to non-Indian settlement under the 1905 Act. Petitioner initially pleaded guilty. Before sentencing, however, petitioner filed a motion to arrest the judgment and to withdraw his guilty plea; he contended that the trial court did not have jurisdiction because he is an Indian and the crime had been committed in "Indian country" that is not subject to the jurisdiction of the State of Utah.[9] The trial court denied that motion, finding that petitioner is not an Indian for purposes of principles governing state jurisdiction over crimes committed by or against Indians in Indian country. Pet. App. I; see Pet. App. A.

Stat. 3141-3143, 3143-3144. As to those lands, Congress in 1910 appropriated funds to pay the Indians $1.25 per acre, in return for which "[a]ll right, title, and interest of the Indians in the said lands [were t]hereby extinguished." Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285. The last major congressional action with respect to the Reservation came in 1948, when Congress "extended" the "exterior boundary of the Uintah and Ouray Reservation" to include a tract of approximately 510,000 acres, commonly referred to as the "Hill Creek Extension." Act of Mar. 11, 1948, ch. 108, § 1, 62 Stat. 72. The status of the forest reserve land, the reservoir land, and the Hill Creek Extension is not at issue in this case.

[9] The term "Indian country" is defined by 18 U.S.C. 1151 to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." See *Oklahoma Tax Commission* v. *Sac and Fox Nation*, No. 92-259 (May 17, 1993), slip op. 8-11. As a general matter, a State has jurisdiction over an offense committed by or against an Indian in Indian country only where Congress has granted jurisdiction to the States—*e.g.*, in a special jurisdictional statute, see *Negonsott* v. *Samuels*, 113 S. Ct. 1119 (1993), or in Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-590, see *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470 (1979). Utah has not acquired jurisdiction over the Indian country at issue here pursuant to either a special jurisdictional statute or Public Law 280.

3. The Utah Court of Appeals reversed. *State* v. *Hagen*, 802 P.2d 745 (1990). The court of appeals noted that the Tenth Circuit has held that Myton and other areas opened to non-Indian settlement by the 1905 Act remain within the Uintah Indian Reservation. *Id.* at 747 (citing *Ute Indian Tribe* v. *Utah*, 773 F.2d 1087 (1985) (en banc), cert. denied, 479 U.S. 994 (1986)). The court also concluded that the State failed to introduce sufficient evidence in the trial court to justify a finding that petitioner is not an Indian. 802 P.2d at 747-748. Accordingly, the court reversed petitioner's conviction and ordered him discharged. *Id.* at 748.

4. The Utah Supreme Court granted the State's petition for a writ of certiorari and reversed the Utah Court of Appeals. Pet. App. A1. In a brief opinion, the court explained that it viewed the case as controlled by its decision the same day in *State* v. *Perank*, No. 860243 (July 17, 1992), *reprinted in* Resp. App. 4a-75a.[10] In *Perank*, the Utah Supreme Court concluded that the provisions of the 1902 Act and the 1905 Act opening lands to non-Indian settlement diminished the Uintah Indian Reservation and that the town of Myton accordingly lies outside the boundaries of the Reservation. See *id.* at 28a-63a. Relying on *Perank*, the Utah Supreme Court reinstated petitioner's conviction. Pet. App. A1.

SUMMARY OF ARGUMENT

A. This Court's decision in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), establishes a clear-statement rule for resolution of claims that Congress has diminished the boundaries of an Indian reservation. Under that rule, an Act of Congress generally does not diminish a reservation unless the Act includes both "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests" and "an unconditional

[10] "Resp. App." refers to the appendix to the brief of respondent in support of the petition.

commitment from Congress to compensate the Indian tribe." *Id.* at 470. A limited exception permits a finding of diminishment "[w]hen events surrounding the passage of [the statute] * * * unequivocally reveal a widely held, contemporaneous understanding that [the statute would diminish the reservation]," *id.* at 471; the statute involved in the instance cited in *Solem* for that proposition (unlike the statute at issue here) contained clear language of cession.

B. The Acts at issue here do not satisfy either requirement of the clear-statement rule articulated in *Solem*. First, they do not require unconditional compensation; rather, the compensation was limited to a share of any proceeds the United States would obtain if it was successful in disposing of the opened lands. Second, the statutes do not make any explicit reference to cession, or in any other way state that the Indians were surrendering all of their interests in the opened lands.

The only feature of the statutes that points toward a finding of diminishment is the statement in the 1902 Act that the opened lands were to be "restored to the public domain." Section 1, 32 Stat. 263. But, as the Court in *Solem* explained, such a reference is not sufficient to justify a finding of diminishment, because it could simply mean that the lands in question were returned to the public domain in the sense that they became available for non-Indian settlement; the languaeg does not expressly indictate that the lands were to be removed from the Reservation. See *Solem*, 465 U.S. at 475 n.17. Moreover, even if such a reference might in some circumstances be adequate to justify a finding of diminishment, it would not suffice here because it was included only in the 1902 Act, not the 1905 Act under which the unallotted lands on the Uintah Indian Reservation actually were opened to settlement.

C. This case does not involve the type of widely held understanding that would justify finding a reservation

diminished even though the statute does not satisfy both aspects of the clear-statement rule articulated in *Solem*. Because only Congress has the power to alter the boundaries of a reservation, the only understanding that should suffice is an understanding shared by Congress and the affected Indians. In this case, there is no basis for supposing that the Indians understood the 1905 Act would alter the boundaries of the Reservation, nor is there any explicit statement in the legislative history that the 1905 Act would have that effect. Accordingly, there is no basis for further investigation of secondary materials. In any event, because those materials are rife with inconsistency and contradiction, they cannot "unequivocally" reveal a widely held understanding sufficient to diminish the Reservation. *Solem*, 465 U.S. at 471.

ARGUMENT

The UINTAH INDIAN RESERVATION WAS NOT DIMINISHED BY THE 1905 ACT OR ITS 1902 PREDECESSOR

A. A Reservation Is Diminished Only When Congress Enacts A Statute Using Unambiguous Language Of Cession, And Either Congress Grants Unconditional Compensation To The Indians, Or There Is An Unequivocal And Widely Held Contemporaneous Understanding That The Reservation Is Diminished

Like several of this Court's previous cases, the present controversy turns on the effect of a surplus land Act opening an Indian reservation to settlement by non-Indians. The Congress that passed that Act (and others like it) no doubt anticipated the eventual demise of the reservation system. But the Court has "never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act. Rather, it is settled law that some surplus

land acts diminished reservation,[11] and other surplus land Acts did not.[12]" *Solem v. Bartlett*, 465 U.S. 463, 468-469 (1984) (citations omitted).[13] As explained in *Solem*, the Court's prior decisions have established a "fairly clean analytical structure" for distinguishing those surplus land Acts that of their own force effected an immediate diminishment of the reservation from those that permitted non-Indians to purchase land within an existing reservation and left to another day the actual redrawing of its boundaries. *Id.* at 470.

The "first and governing principle" is that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. The dispositive question, then, is whether "Congress [has] clearly evince[d] an intent to change boundaries." *Ibid.* (internal quotation marks,

---

[11] See, *e.g.*, *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977); *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975).

[12] See, *e.g.*, *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962).

[13] As the Court noted in *Solem*, the precise location of reservation boundaries "seemed unimportant" at the time the surplus land Acts were passed. 465 U.S. at 468. Until 1913, Indian title, not the reservation boundary, generally determined which sovereign had jurisdiction over a particular tract of land. See, *e.g.*, *Bates* v. *Clark*, 95 U.S. 204, 208-209 (1877); *Ex parte Crow Dog*, 109 U.S. 556, 560-462 (1883). In 1913, however, this Court initiated an expansion of the judicial definition of Indian country to include lands that had been reserved and set apart as an Indian reservation by Executive Order, even though they were not owned by Indians. *Donnelly* v. *United States*, 228 U.S. 243, 268-269 (1913). The expansion culminated in 1948, when Congress enacted a statutory definition of Indian country that includes lands held in fee by non-Indians within reservation boundaries. Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. 1151(a)); see generally *Solem*, 465 U.S. at 468 (summarizing the expansion of the concept of Indian country).

ellipses, and citation omitted). The most probative evidence bearing on that question is the statutory language used to open the reservation. Language that "[e]xplicit[ly] refer[s] to cession" or otherwise "evidenc[es] the present and total surrender of all tribal interests" in the opened area suggests that Congress meant to sever it from the reservation. *Ibid.* When such language is buttressed by an unconditional commitment to compensate the tribe, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Id.* at 470-471.[14]

Cession language and unconditional compensation are not, however, absolute prerequisites to a finding of diminishment. As explained in *Solem*, "[w]hen events surrounding the passage of a surplus land Act * * * unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," the Court has inferred that Congress shared that understanding and intended to diminish the reservation. *Solem*, 465 U.S. at 471. That portion of the *Solem* opinion was explaining the holding in *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977).[15] In that case, the Court concluded that a reservation had been diminished by a statute that, although it contained language of cession, did not offer payment to the Indians of a sum certain as compensation; the *Rosebud* Court relied heavily on the fact that the statute

---

[14] In the presence of both of those factors, the Court found a reservation to have been extinguished in *DeCoteau* v. *District County Court*, 420 U.S. 425, 431-449 (1975). In the presence of neither factor, the Court found reservations not to have been diminished in *Solem*, 465 U.S. at 472-476; *Mattz* v. *Arnett*, 412 U.S. 481, 494-505 (1973); and *Seymour* v. *Superintendent*, 368 U.S. 351, 355-356 (1962).

[15] See *Solem*, 465 U.S. at 471 (stating that "our opinion in *Rosebud Sioux Tribe* demonstrates" the accuracy of the discussion at hand).

was designed to implement an agreement with the Indians that used language of cession and indisputably provided for diminishment of the reservation. See *id.* at 591-595. The *Solem* Court made clear, however, that the holding in *Rosebud* was not to be given broad application, emphasizing that "[t]here are * * * limits to how far [the Court] will go to decipher Congress' intention in any particular surplus land Act,"—limits that require "substantial and compelling evidence of a congressional intention" to diminish in order to justify a ruling that a reservation has been diminished. 465 U.S. at 472. That requirement is consistent with the general rule that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *South Dakota* v. *Bourland*, No. 91-2051 (June 14, 1993), slip op. 7 (quoting *County of Yakima* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S. St. 683, 693 (1992)).

B. Neither The 1905 Act Nor Its 1902 Predecessor Contained A Provision For Unconditional Compensation Of The Indians Or Language Of Cession

1. *The 1905 And The 1902 Act Did Not Provide For Payment Of A Sum Certain To The Indians*

As the Court has explained, an important indicator of congressional intent to alter reservation boundaries is the contemporaneous appropriation of funds to provide unconditional compensation—payment of a "sum certain [16] —to the Indians for the lands being opened to settlement. See *Solem*, 465 U.S. at 470-471. Neither the 1905 Act nor the predecessor 1902 Act providing for the opening of unallotted lands on the Uintah Indian Reservation furnished unconditional compensation to the Tribe. As

[16] See *Solem*, 465 U.S. at 469 n.10; *Rosebud*, 430 U.S. at 598 n.20; *DeCoteau*, 420 U.S. at 446, 448.

mentioned above, the sole compensation offered the Indians was to come from whatever proceeds the government might obtain from the disposition of the unallotted lands. 1905 Act, § 1, 33 Stat. 1070 (incorporating by reference the provisions for application of the proceeds in Section 1 of the 1902 Act, 32 Stat. 264).[17] Hence, the government was under no obligation to compensate the Indians at all unless it was successful in disposing of the unallotted lands.[18]

The discussion of the payment mechanism in this Court's earlier decisions makes it clear that the arrangement for the Uintah Indian Reservation was not the type of unconditional compensation or sum-certain payment that suggests an intention on the part of the Congress to diminish a reservation.[19] The method of compensation

---

[17] That conditional payment obligation differs from the compensation later made by the United States for the forest reserve and reservoir lands discussed in note 8, *supra*. See also 32 Stat. 264 (provision of the 1902 Act providing that $70,064.48 was "to be paid to the Uintah and White River Utes" to cover various claims of the Indians against the United States, if those Indians consented to the allotment described in the 1902 Act).

[18] The legislative history suggests that Congress clearly understood the difference between the two modes of payment, and understood that the Indians had a strong preference for unconditional compensation. The Commissioner of Indian Affairs testified at a hearing before the Senate Committee on Indian Affairs:

> It will make a great difference in negotiating with [the Indians on the Uintah Indian Reservation] whether you propose to pay a cash amount or pay them as the land is sold. The system of paying the Indians for land as it is being sold has not proved the success it was hoped it would be. The Indians are afraid of it. But, generally speaking, the Indians will under certain conditions consent to sell their land if they are paid a cash sum.

S. Doc. No. 212, 57th Cong., 1st Sess. 5 (1902).

[19] See *Solem*, 465 U.S. at 469 n.10 (describing statute at issue in *Seymour* v. *Superintendent*, 368 U.S. 351, 356 (1962), under which "the Colville Tribe received whatever proceeds these sales

closely resembles the arrangements under the statutes that were found not to have effected a diminishment in *Solem*, 465 U.S. at 473; *Mattz* v. *Arnett*, 412 U.S. 481, 495 (1973); and *Seymour* v. *Superintendent*, 368 U.S. 351, 355-356 (1962). See *DeCoteau* v. *District County Court*, 420 U.S. 425, 447-449 (1975) (discussing that aspect of *Mattz* and *Seymour*).[20] Accordingly, the lack of unconditional compensation suggests that neither the 1905 Act nor its 1902 predecessor altered the boundaries of the Uintah Indian Reservation.[21]

2. *Neither The 1905 Act Nor Its 1902 Predecessor Contained Language Of Cession*

a. *The Act of March 3, 1905.*—Analysis of the relevant statutory language begins with the 1905 Act, the

---

generated, rather than a sum certain"); *ibid.* (distinguishing between "sum-certain payment" and "a provision guaranteeing the Tribe only the proceeds from the sale of the opened lands"); *DeCoteau*, 420 U.S. at 448 (describing "contrast" between agreement providing for "a sum certain" and agreement that "benefited the tribe only indirectly, by establishing a fund dependent on uncertain future sales of its land to settlers"); *ibid.* (describing contrast between statute that "provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefits" and "a straightforward agreement ceding lands to the Government for a sum certain").

[20] A statute involving a similar conditional compensation arrangement was found adequate to diminish a reservation in *Rosebud*. But the statute at issue in *Rosebud* contained explicit language of cession and, as *Solem* explains, further rested on the existence of a "widely held, contemporaneous understanding" sufficient to justify diminishment even where the statute itself did not satisfy the normal requirements for a finding of congressional intent to diminish. 465 U.S. at 471-472. We discuss *Rosebud* at length in Point C, *infra*.

[21] Cf. *Ash Sheep Company* v. *United States*, 252 U.S. 159, 164-166 (1920) (Indians retain equitable interest in lands ceded to United States where United States undertook to sell lands for benefit of the Indians).

statute under which President Roosevelt opened a portion of the Reservation to non-Indian settlement. It was in the 1905 Act that Congress specified "the manner of opening [unallotted] lands for settlement and entry, and for disposing of the same." Section 1, 33 Stat. 1069. In particular, the 1905 Act provided that the "unallotted lands on the Uintah Reservation * * * shall be disposed of under the general provisions of the homestead and town-site laws of the United States." *Ibid.* That language does not refer to a "cession" or otherwise "evidenc[e] the present and total surrender of all tribal interests" in the opened lands. *Solem*, 465 U.S. at 470. Rather, it closely resembles the language of the statutes at issue in *Solem*, *Seymour*, and *Mattz*.[22] As a unanimous Court explained in each of those cases, such statutes did not terminate the reservation, but merely "open[ed] the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Seymour*, 368 U.S. at 356 (quoted in *Mattz*, 412 U.S. at 497, and in *Solem*, 465 U.S. at 473).

The operative language here and in those cases contrasts sharply with that of the statutes at issue in *DeCoteau* and *Rosebud*, the two recent cases in which the Court has found that reservation boundaries were altered by Congress. See *DeCoteau*, 420 U.S. at 445 (statute

---

[22] See Act of June 17, 1892, ch. 120, 27 Stat. 52 (Act at issue in *Mattz*, providing that excess lands were "subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands"); Act of Mar. 22, 1906, ch. 1126, § 3, 34 Stat. 81 (Act at issue in *Seymour*, providing that excess lands "shall be open to settlement and entry under the provisions of the homestead laws"); Act of May 29, 1908, ch. 218, § 2, 35 Stat. 461 (Act at issue in *Solem*, providing for the disposition of unallotted lands under the "general provisions of the homestead and town-site laws of the United States").

provided that the Indians did "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands," Act of Mar. 3, 1891, ch. 543, 26 Stat. 1036); *Rosebud*, 430 U.S. at 596-597 (statute provided that Indians did "hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted," Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254). In sum, the 1905 Act contains neither an "[e]xplicit reference to cession" nor any other "language evidencing the present and total surrender of all tribal interests" in the portion of the Reservation opened to non-Indian settlement. Accordingly, under *Solem*, it fails to demonstrate a clear congressional intention to alter the boundaries of the Uintah Indian Reservation.

b. *The Act of May 27, 1902.*—The 1902 Act likewise does not contain language demonstrating that Congress provided for the total surrender of all tribal interests in the portions of the Reservation that were opened to non-Indian settlement. Like the 1905 Act, the 1902 Act does not refer to any cession, sale, extinguishment, or conveyance of tribal lands.

The 1902 Act did state that unallotted lands eventually would "be restored to the public domain." Section 1, 32 Stat. 263. As the Court explained in *Solem*, a statement that lands have been restored to the public domain can point in the direction of diminishment, on the understanding that lands set aside in a reservation are, in some sense, removed from the public domain. Indeed, the 1902 Act's reference to "restor[ation] to the public domain" was the principal basis for the decision of the Utah Supreme Court in *Perank*, Resp. App. 20a-28a, on which that court relied in this case. In our view, however, the Utah Supreme Court gave insufficient deference to this Court's decision in *Solem*, the most recent occasion on which this Court considered the effect of a statute referring to a

restoration of reservation lands to the public domain.[23] In *Solem*, the Court characterized such a reference as "hardly dispositive," noting that "even without diminishment, unallotted opened lands could be conceived of as being in the 'public domain' inasmuch as they were available for settlement." 465 U.S. at 475 & n.17;[24] see also *Newhall*

---

[23] The Utah Supreme Court in *Perank* also relied on passages in this Court's opinions in *Seymour* and *Rosebud*. Resp. App. 20a-21a. Neither passage was related directly to the issues before the Court in those cases. In any event, even if they are taken at face value, neither reference would shed much light on the statute at issue here. First, the Court in *Seymour* referred in passing to a statute not at issue in the case, which had vacated and restored to the public domain" a portion of the reservation at issue. 368 U.S. at 354 (quoting Act of July 1, 1892, ch. 140, § 1, 27 Stat. 63). The Court implicitly assumed that the 1892 Act had diminished the boundaries of the reservation. That comment does not shed much light on the meaning of the 1905 Act, which does not use the term "vacated," a term that expresses a concept of extinguishment completely absent from the language at issue here.

Similarly, the *Rosebud* Court accepted the parties' understanding that the Act of March 2, 1889, ch. 405, § 21, 25 Stat. 896, terminated a portion of the Great Sioux Reservation by providing that it was "restored to the public domain." 430 U.S. at 589 & n.5. As the Court noted, however, that termination was accomplished with the agreement of three-fourths of the adult male Indians on the Reservation, as required by the treaty between the United States and the Sioux Nation. See *ibid.* If diminishment were found here, it would have occurred without the consent of the Indians. Moreover, the overall thrust of the 1889 Act concerning the Great Sioux Reservation, as set forth in its title, was to divide the Reservation "into separate reservations and to secure the relinquishment of the Indian title to the remainder," 25 Stat. 888 (see *Hodel* v. *Irving*, 481 U.S. 704, 706 (1987)), and the land restored to the public domain was that lying "outside of the separate reservations," § 21, 25 Stat. 896. The substitution of six smaller reservations for the single Great Sioux Reservation, and the assignment of individual Sioux members to one of the six reservations (see §§ 1-6, 16), was the functional equivalent of the cession of the remainder.

[24] Significantly, the "public domain" argument rejected by the Court in *Solem* was advanced not only by the petitioner in that case, but also by the Counties of Duchesne and Uintah, Utah, which

v. *Sanger*, 92 U.S. 761, 763 (1876) ("The words 'public lands' are habitually used * * * to describe such as are subject to sale or other disposal under general laws.").[25]

Moreover, even if a reference to the "public domain" might in some circumstances be sufficient to justify a finding of diminishment, Congress's omission of that phrase from the 1905 Act makes it particularly inappropriate to place significant weight on the reference in this case. As discussed above, the 1902 Act—in which the only reference to the "public domain" appears—conditioned implementation on the consent of the Indians. Section 1, 32 Stat. 263-264. Despite several extensions, that consent was not forthcoming. Notwithstanding the absence of consent, Congress finally provided in the 1905 Act for the allotment and subsequent opening of surplus lands to non-Indian settlement. Significantly, however, the 1905 Act, under which the Reservation was opened, did not carry forward the 1902 Act's reference to the "public domain"; instead, the 1905 Act itself specified "the manner of opening [unallotted] lands for settlement and entry," substituting a more detailed statement that the lands would be "disposed of under the general provisions of the homestead and town-site laws of the United States." Compare 1902 Act, § 1, 32 Stat. 263, with 1905 Act, § 1, 33 Stat. 1969.[26] As in earlier cases in which Con-

---

appeared as amici, presumably because of the reference to the public domain in the 1902 Act concerning the Uintah Reservation. See 465 U.S. at 475 n.16.

[25] Cf. *Utah Division of State Lands* v. *United States*, 482 U.S. 193, 206 (1987); *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531, 548-549 n.15 (1987). In evaluating the significance of a reference to lands being in the "public domain," it is important to recall that at the time the statute containing that reference was enacted, the question whether the opened lands continued to be a portion of the reservation would have had little practical significance; it would not, for example, have affected criminal jurisdiction. See note 13, *supra*.

[26] The differences between the two statutes are not limited to the deletion of the reference to the "public domain." Under the 1902

gress failed to enact bills that more clearly suggested an intent to diminish or disestablish a reservation, Congress's abandonment of the public domain language suggests that any effort "to terminate the reservation * * * failed completely." *Mattz*, 412 U.S. at 504.[27]

At bottom the Utah Supreme Court's analysis rests on the conclusion that the 1905 Act evidenced an intent to diminish the Uintah Indian Reservation by implicitly in-

---

Act, Congress provided that "*all the unallotted lands* within said reservation *shall be restored to the public domain.*" 32 Stat. 263 (emphasis supplied). The 1905 Act, by contrast, provided more generally that the "unallotted lands [except for mineral lands and lands for a forest reserve] shall be disposed of [under the homestead laws] and shall be opened to settlement and entry by proclamation of the President," 33 Stat. 1069, and also authorized the President to set aside lands "necessary to conserve and protect the water supply for the Indians or for general agricultural development," 33 Stat. 1070.

[27] The proposition that Congress retreated in the face of continued opposition on the part of the Ute Indians on the Uintah Indian Reservation is supported by Congress's continued efforts to gain that consent over a period of several years. See S. Doc. No. 212, 57th Cong., 1st Sess. 4 (1902) (statement of Commissioner of Indian Affairs at congressional hearing of his "understand]ing] that there is a treaty arrangement with those Indians which will make it necessary for you to treat with them before it can be thrown open to settlement"); see *id.* at 5 (discussing failure of previous negotiations). Those persistent negotiating efforts contrast favorably with Congress's treatment of the neighboring Uncompahgre Indians, with respect to whom Congress—in the same statute that appointed the first commission to seek consent from the Ute Indians—authoried unilateral and immediate allotment. See Act of Aug. 15, 1894, ch. 290, § 20, 28 Stat. 337-338. As a contemporary House Report explained, the difference in treatment rested on Congress's view that the Uncompahgres had only "the privilege of temporary occupancy," while the Uintah Reservation Indians were "the owners of the lands within the reservation, because * * * it was provided that the lands within the Uintah Reservation should be 'set apart for the permanent settlement and exclusive occupation of the Indians.'" H.R. Rep. No. 660, 53d Cong., 2d Sess. 1, 2-3 (1894) (quoting Act of May 5, 1864, ch. 77, § 2, 13 Stat. 63).

corporating a phrase from the 1902 Act. Given the omission of that phrase from the 1905 Act, the failure of the conditions on which the 1902 Act was predicated, and the ambiguity of the phrase in the first place, the use of the phrase "public domain" in the 1902 Act fails to carry the State's burden of showing "that Congress clearly evince[d] an intent to change [the] boundaries" of the Reservation. *Solem*, 465 U.S. at 470 (internal quotation marks, ellipses, and citation omitted).[28]

C. The 1905 Act And The 1902 Act Do Not Reflect An Unequivocal And Widely Held Contemporaneous Understanding That They Would Diminish The Uintah Indian Reservation

Relying on the decision in *Rosebud*, the Court stated in Solem that in some cases a statute will be held to diminish or extinguish an Indian reservation even if it does not bear all of the usual marks of such a statute—express language of cession and unconditional compensation for the Indians. In the words of the *Solem* Court, that result is appropriate

> [w]hen events surrounding the passage of a surplus land Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to

---

[28] An additional feature of the statutes that suggests they were not intended to alter the boundaries of the reservation is the absence of a specific statutory description of the land that was, in respondent's view, removed from the Reservation. In *DeCoteau* and *Rosebud*, the relevant statutes precisely described the areas that were found to have been removed from reservation status; the finding of diminishment in those cases therefore comported with the requirement that Congress itself must "clearly evince an 'intent . . . to change . . . boundaries.'" *Solem*, 465 U.S. at 470 (quoting *Rosebud*, 430 U.S. at 615). By contrast, in this case Congress did not describe the areas of the Uintah Indian Reservation that were to be opened to non-Indian settlement, but instead left it to the Executive Branch to identify such lands in the future.

> Congress—unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.

465 U.S. at 471.

The circumstances of *Rosebud* that were held sufficient to justify diminishment illustrate the narrowness of that exception to the general rule. *Rosebud* involved an unequivocal and universally shared understanding among the participants to the transaction that the statute in question (the Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254) would diminish the boundaries of the Rosebud Sioux Reservation. In particular, it is clear that the Indians had agreed to a diminishment of the Reservation; in 1901, three-fourths of the adult male Indians on the Rosebud Sioux Reservation had executed an agreement (negotiated by Inspector James McLaughlin)[29] under which they would "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to" the land in question, in return for an unconditional payment of just over $1,000,000. See *Rosebud*, 430 U.S. at 590-591 & n.8.[30] Because Congress was unwilling to agree to outright payment for the lands, Inspector McLaughlin returned to that Reservation to renegotiate the agreement. See id. at 591-592. Although he failed to secure the consent of three-fourths of the adult male Indians, he did secure the consent of a simple majority to a 1903 agree-

---

[29] Interestingly, Inspector McLaughin also conducted the unsuccessful negotiations with the Sioux Indians over the land at issue in *Solem*, see 465 U.S. at 476-477, and with the Ute Indians over the land at issue in this case, see H.R. Doc. No. 33, 58th Cong., 1st Sess. 3-7 (1923) (report by Inspector McLaughlin of unsuccessful negotiations).

[30] The applicable treaty with the Sioux Indian Nation provided that no treaty for cession of any part of its reservation would be valid without the consent of three-fourths of the adult male Indians on that reservation. See *Rosebud*, 430 U.S. at 589.

ment that—using the same language of cession as the 1901 agreement—made payment contingent upon successful sale of the land, with the compensation per acre raised from $2.50 to $2.75. See *id.* at 592-594. Congress promptly enacted a statute that set forth the 1901 agreement in its entirety, and then "accepted, ratified, and confirmed [that Agreement] as * * * amended and modified" to delete the obligation of unconditional compensation. Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254-256; see *Rosebud*, 430 U.S. at 594-597.

As the *Rosebud* Court explained, a ruling that the Rosebud Sioux Reservation was not diminished by the 1904 Act at issue there could only have frustrated congressional intent. The statute used unequivocal language of cession, and adopted an agreement of the Indians that unequivocally approved the cession (albeit with modifications approved by only a simple majority of the adult male Indians). Inspector McLaughlin advised the Indians in unambiguous language that both the 1901 and the 1903 Agreements, if enacted by Congress, would alter the boundaries of the Reservation. See *Rosebud*, 430 U.S. at 591-593. The legislative history reviewed by the Court contained "no indication that Congress intended to change anything [from the 1901 Agreement] other than the form of, and responsibility for, payment," *id.* at 594-595, and the House Report in fact flatly stated that the bill would "ratify and amend an agreement * * * providing for the cession to the United States of the unallotted portion of [the Indians'] lands," see *id.* at 595 (quoting H.R. Rep. No. 443, 58th Cong., 2d Sess. 3 (1904)).

Application of the *Rosebud* analysis to this case shows that whatever the desires of individual Members of Congress, there is no evidence—let alone unequivocal evidence—of a widely held contemporaneous understanding that the opened lands would be removed from the Uintah Indian Reservation. First, there is no document in this case that establishes the "unmistakable baseline purpose

of disestablishment" that was so important to the Court in *Rosebud*, 430 U.S. at 592; none of the relevant documents—the 1905 Act, the previous Acts dealing with the Reservation, or any agreement with the Indians—uses the indisputable language of cession that was a feature of all of the relevant documents in *Rosebud*. Moreover, in our view, the requirement in *Solem* that the "understanding" be "widely held" requires proof that the Indians shared in an understanding that alteration of the Reservation's boundaries was at hand; the only obvious manifestation of such an understanding on the part of the Indians is an agreement of cession, like the one approved in *Rosebud*. Because the Indians in this case steadfastly refused to consent to any alteration of the Reservation boundaries, there is no such agreement in this case.[31] Accord-

---

[31] Indeed, as Inspector McLaughlin explained, the Indians on the Uintah Indian Reservation firmly believed "that their reservation could not be opened to settlement without their consent," and that "they were thus advised by officials of the Department [of the Interior] during their visit to Washington." H.R. Doc. No. 33, 58th Cong., 1st Sess. 5 (1903). The view of the Indians was not entirely unreasonable, considering the date of the negotiations in question—May 1903, only four months after this Court's January 1903 decision in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 566-568, first upheld the power of Congress to diminish a reservation unilaterally.

Given the Indians' view on that question, the Utah Supreme Court erred in relying (Resp. App. 37a) on Inspector McLaughlin's advice to the Indians that "there will be no outside boundary line to this reservation." Minutes of Council Meetings Between Inspector McLaughlin and the Ute Indians 42 (May 18-23, 1903), JX 162. "JX" refers to the joint exhibits of the parties in *Ute Indian Tribe* v. *Utah*, 521 F. Supp. 1072 (D. Utah 1981); the parties have stipulated that the record in this case includes the record in the *Ute Indian* case, see Resp. App. 164a-165a.) In any event, the Indians' response to Inspector McLaughlin's advice was to reject the proposal by an overwhelming margin, see note 6, *supra*. Because the allotment program under the 1902 Act was conditioned on the Indians' consent, it failed and was replaced by the program set forth in the 1905 Act, at issue here. There is no suggestion that any representative of the government advised the Indians that the 1905 Act would alter the boundaries of the Reservation.

ingly, it would be inappropriate to rely on "understandings" to conclude that the Reservation was diminished.

The Utah Supreme Court's contrary conclusion rested to a considerable degree on its understanding of a variety of materials regarding the contemporaneous and subsequent understanding of the 1902 and 1905 Acts. Resp. App. 44a-61a. For two reasons, we do not believe that those materials support the decision of the court below. First, although the Court's decision in this area frequently have mentioned such materials, we believe they have at best only limited relevance. See *Solem*, 465 U.S. at 471 (noting that the Court has considered such materials relevant "[t]o a lesser extent" than the statutory text and other sources discussed above).[32] The suggestion of the *Solem* Court that a widely held, contemporaneous understanding in some cases could be sufficient to justify a finding of diminishment was not a license for the lower courts to conduct a wide-ranging investigation into the views that individual legislators and administrative officials took of legislation. Because only Congress and the Indian Tribes have the power to alter the limits of a Tribe's sovereignty, it is not appropriate to rest decisions regarding those limits on the views of third parties who could not themselves alter those limits.

Second, we do not believe that the historical record supports the Utah Supreme Court's view that both Congress and the Executive Branch understood the 1902 and 1905 Acts to alter the boundaries of the Uintah Indian Reservation. Rather, the historical record here, as in *Solem*, is "so rife with contradictions and inconsistencies

---

[32] Moreover, it is not clear that such secondary materials have affected any of the Court's recent holdings in the area. As we explained in note 14, *supra*, all of the Court's recent decisions other than *Rosebud* can be explained by the bright-line rule articulated in *Solem*; and, as discussed above, *Rosebud* itself appears to rest primarily on the terms of congressional enactments and tribal agreements, rather than on the understanding other parties had of those documents.

as to be of no help to either side." 465 U.S. at 478. Most of the materials on which the Utah Supreme Court relied are ambiguous, indicating only that the land in question was to be restored to the "public domain."[33] As discussed above, such references, even in the opening statute itself, do not directly address the question at issue in this case.

To be sure, a few federal statutes enacted shortly after the 1905 Act referred to the Reservation as having been diminished by the 1902 and 1905 Acts.[34] But a number of other statutes apparently rested on the contrary assumption that the Reservation was not diminished by the 1902 and 1905 Acts.[35] Still other statutes referred to the "former" Reservation, a reference that cannot be correct, because all agree that at least the allotted parcels continued to constitute a reservation.[36] Finally, on some

---

[33] See, *e.g.*, Resp. App. 45a-46a (President Roosevelt's Proclamations), 51a-52a (subsequent statements of officials in the Department of the Interior), 54a-55a (1971 order of the Department of the Interior, 57a-60a (subsequent judicial decisions).

[34] Act of Jan. 27, 1906, ch. 7, 34 Stat. 9 (referring to "lands which were heretofore a part of the Uintah Indian Reservation"); Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285 (referring to "lands within the ceded Uintah Indian Reservation"); Act of July 20, 1912, ch. 244, § 1, 37 Stat. 196 (referring to "land which was formerly a part of the Uintah Indian Reservation"). As the Court in *Solem* explained in a similar context, those references may well have been referring to land as having left the common lands of the Reservation, rather than having left the Reservation entirely. 465 U.S. at 475 n.17.

[35] Act of Aug. 1, 1914, ch. 222, § 21, 38 Stat. 604 (referring to "the bridge at Myton, on the Uintah Indian Reservation"); Act of Mar. 4, 1929, ch. 705, § 1, 45 Stat. 1584 (referring to "the State Experimental Farm * * * within the Uintah and Ouray Indian Reservation"); Act of Apr. 22, 1932, ch. 125, § 1, 47 Stat. 111 (same). Similarly, two statutes referred to an extension of the "exterior boundary" of the Reservation, a reference that assumes the Reservation remained a cohesive whole including the opened lands. Act of Mar. 11, 1948, ch. 108, § 1, 62 Stat. 72; Act of Aug. 9, 1955, ch. 263, 69 Stat. 544. See generally *Ute Indian Tribe* v.

occasions contradictory references were included in the same Act.[37] As in *Solem*, the ready availability of "ex-

---

Utah, 521 F. Supp. 1072, 1133-1134 (D. Utah 1981) (cataloguing legislative materials that assume the opened lands remain in the reservation), aff'd in relevant part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986).

An extensive number of statutes referred to the Reservation as continuing in existence. Act of Mar. 3, 1921, ch. 119, § 21, 41 Stat. 1245 (obligation to construct bridge "free from all expense to the * * * Indians of the Uintah and Ouray Reservation"); Act of Mar. 4, 1931, ch. 522, 46 Stat. 1567 (appropriation for "[i]rrigation system, Uintah Reservation"); Act of Feb. 2, 1932, ch. 12, 47 Stat. 22 (same); Act of June 19, 1934, ch. 648, § 1, 48 Stat. 1033 (same); Act of Aug. 9, 1937, ch. 570, § 1, 50 Stat. 573 (referring to funds "apportioned to the Indians of the Uintah and Ouray Reservation"); Act of Mar. 16, 1950, ch. 59, 64 Stat. 19 (referring to the "Ute Indian Tribe of the Uintah and Ouray Reservation"); Act of Aug. 21, 1951, ch. 338, §§ 1-2, 65 Stat. 194 (same); Act of Aug. 27, 1954, ch. 1009, §§ 1-2, 68 Stat. 868 (same); Act of July 14, 1956, ch. 603, §§ 1-5, 70 Stat. 546-547 (same).

[36] Act of June 21, 1906, ch. 3504, 34 Stat. 375 ("former Uintah Reservation"); Act of June 29, 1906, ch. 3599, 34 Stat. 611 ("former Uintah Indian Reservation"); Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285 ("former Uintah Reservation"); Act of May 14, 1920, ch. 187, 41 Stat. 599-600 ("former Uintah Indian Reservation"); see also Presidential Proclamation of Sept. 1, 1906, 34 Stat. 3228 (referring to the "former Uintah Indian Reservation"). Indeed, one statute referred to the "allotted lands of any Indian of the former Uintah * * * reservation," Act of Apr. 30, 1908, ch. 153, 35 Stat. 95, a reference that can make sense only on the understanding that the allotted lands had left the "reservation" in the general (though inaccurate) sense that they were no longer common lands set aside for and beneficially held by a tribe.

[37] Section 21 of the Act of Mar. 3, 1911, ch. 210, 36 Stat. 1073-1074, refers at one point to persons having made "homestead entry for land in the Uintah Indian Reservation"—a reference that assumes the opened lands remained in the Reservation—and later on the same page refers to "the proceeds of the sale of lands within the ceded Uintah Indian Reservation"—a reference that appears to rest on the opposite assumption. Similarly, the Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285, which compensated the Indians for land set apart for reservoir purposes, see note 8, *supra*, refers to those

amples pointing in both directions leave[s] one with the distinct impression that subsequent Congresses had no clear view whether the opened territories were or were not still part of the * * * Reservation." 465 U.S. at 479.[38] Given the hazards involved in attempting to infer the intent of one Congress from the views of subsequent Congresses, see *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980), the inconsistent references contribute nothing of substance to the decision of this case.

Finally, the Utah Supreme Court relied on its belief that the Department of the Interior had treated the 1902 and 1905 Acts as having diminished the Reservation. See Resp. App. 52a-56a, 57a n.27. As with the statutory materials, many of the items on which the court relied do not address the question at hand.[39] The two formal

---

lands as lying "in the former Uintah Indian Reservation," but later in the same paragraph states that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished."

[38] To the extent conclusions can be drawn from the legislative record, it appears that Utah's Senators Sutherland and Smoot were the principal sources of references suggesting that the 1902 and 1905 Acts had diminished the Reservation. Such references ceased shortly after Senator Sutherland's departure from the Senate in 1917. See *Ute Indian Tribe* v. *Utah*, 521 F. Supp. 1072, 1133 (D. Utah 1981), aff'd in relevant part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986).

[39] The bulk of the materials the court cites at Resp. App. 57a n.27 do nothing more than refer incorrectly to the "former" Uintah Indian Reservation. See H.R. Rep. No. 5010, 59th Cong., 1st Sess. 1-2 (1906); Letter from C.F. Darrabee, Acting Commissioner of Indian Affairs, to H.C. Means (Sept. 26, 1907), JX 336; Letter from First Assistant Secretary of the Department of the Interior to Commissioner of Indian Affairs (Nov. 8, 1907), JX 338; Letter from Secretary of the Department of the Interior to Secretary of the Treasury (Dec. 19, 1908), JX 341. Moreover, given the limited information contained in those documents, it is difficult to ascertain whether the documents involved portions of the Reservation that were opened to settlement under the 1905 Act, rather than land

notices of the Secretary on which the court relied are as ambiguous as much of the statutory material, although on balance they seem to support our understanding.[40] To be sure, some of the items do include statements by lower level officials in the Department of the Interior indicating that the lands opened to non-Indian settlement under the 1905 Act were removed from the Reservation.[41] But, in light of the inconsistent practice of Congress and the Secretary, there is no basis for relying on those statements to provide a definitive resolution of the question against the Tribe.

* * * *

At bottom, the 1902 and 1905 Acts do not contain the clear expression of intent to change the Reservation's

---

that might have been affected by one of the other actions Congress had taken with respect to the Reservation.

[40] Although the 1945 Order Notice, 10 Fed. Reg. 12,409, discussed at length at Resp. App. 52a-54a, does state at one point that the lands not sold pursuant to the 1902 and 1905 Acts should be "added to and made a part of the existing reservation," at an earlier point it describes those lands as "lands which are now or may hereafter be classified as undisposed-of opened lands *of the Uintah and Ouray Reservation.*" *Ibid.* (emphasis added). The latter reference rests on the assumption that the lands in question had never been severed from the Reservation. Similarly, the 1971 Order Notice, 36 Fed. Reg. 19,920, states that the lands in question "were restored to the public domain"; it does not state that they were severed from the Reservation. Indeed, the notice refers at another point to "the undisposed-of opened lands of said reservation" being "restored to tribal ownership," suggesting that the opening of the lands had altered ownership but not severed the lands from the Reservation. *Ibid.* For a similar reference, see Commissioner of Indian Affairs, *Annual Report* 44 (1918), JX 394 (referring to "areas of unallotted land within this reservation" that had been opened to homestead entry).

[41] 1929 Annual Report of Uintah and Ouray Agent 1, JX 420; 1931 Annual Report of Uintah and Ouray Agent 4-6, JX 425; 1932 Annual Report of Uintah and Ouray Agent 1-2, JX 427; Bureau of Indian Affairs, Phoenix Area Office, *Information Profiles of Indian Reservations in Arizona, Nevada, & Utah* 151, 155 (1976), JX 480.

boundaries that this Court's cases have required. Nor can the State establish the type of widely shared understanding of the effect of those Acts that would justify treating the Acts as going farther than the terms Congress chose to express its action. The Tribe consistently refused to consent to any alteration of the Reservation's boundaries, and Congress never adopted any statute explicitly attempting to alter the boundaries unilaterally. Accordingly, this Court should hold that the Reservation was not diminished by the provisions of the 1905 Act, and its 1902 predecessor, that opened portions of the Reservation to non-Indian settlement.

CONCLUSION

The judgment of the Supreme Court of Utah should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MYLES E. FLINT
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Acting Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

EDWARD J. SHAWAKER
MARTIN W. MATZEN
Attorneys

JUNE 1993

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No. 86-1436

YANKTON SIOUX TRIBE OF INDIANS, PETITIONER

v.

STATE OF SOUTH DAKOTA, ET AL.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 796 F.2d 241. The prior opinion of the court of appeals is reported at 683 F.2d 1160. The opinion of the district court (Pet. App. 9-33) is reported at 604 F. Supp. 1146, and the prior opinions of the district court are reported at 566 F. Supp. 1507 and 521 F. Supp. 463.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1986, and a timely petition for rehearing was denied on November 7, 1986 (Pet. App. 34). On January 29, 1987, Justice Blackmun extended the time within which to file the petition for a writ of certiorari to and including March 9, 1987. The petition for a writ of

certiorari was filed on March 4, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the title to the bed of Lake Andes, a shallow, navigable water body of approximately 4,000 acres in South Dakota. Lake Andes lies within the exterior boundaries of the Yankton Sioux Indian Reservation, which was established by the 1858 Treaty with the Yankton Tribe of Sioux, 11 Stat. 743 (Pet. App. 35-46). In 1803, the United States acquired sovereignty over the lands at issue by the Louisiana Purchase. In the years following 1803, the Yankton Sioux began moving into the general area in the vinicity of Lake Andes. Pet. 5. In Article I of the 1858 Treaty, the Tribe ceded and relinquished to the United States all of the lands claimed by them "except four hundred thousand acres thereof" (Pet. App. 36). The exterior boundary of this reservation was described in Article I, and Lake Andes falls within that boundary.

The State of South Dakota was admitted into the Union by the Act of February 22, 1889, ch. 180, 25 Stat. 676. Several years thereafter, in 1892, the United States and the Tribe entered into a cession agreement, which was later ratified by Congress as part of the Indian Department Appropriations Act of 1894, ch. 290, § 12, 28 Stat. 314-319. Article I of the Cession Agreement stated that the Indians "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians [by the 1858 Treaty]" (28 Stat. 314). In return, Article II provided that "[i]n consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000)" (28 Stat. 315).

2. The Lake Andes Migratory Waterfowl Refuge was established by Executive Order No. 7292, dated February 14, 1936, "in order to effectuate further the purposes of the Migratory Bird Conservation Act (45 Stat. 1222) * * *." In the following years, the Fish and Wildlife Service began to acquire property interests to allow it to control and manage Lake Andes as part of the Refuge. In 1939, the State of South Dakota and the United States executed an agreement by which the State, which had asserted title to the lakebed, granted the United States an exclusive and perpetual right to operate and maintain the lakebed for migratory waterfowl and wildlife conservation purposes. Pet. App. 11-12. Since that time, Lake Andes has been managed by the Fish and Wildlife Service (or its predecessor agencies) in the Department of the Interior as the most important component of the Refuge.

3. In the summer of 1976, the bed of Lake Andes was dry and had become covered with vegetation. Three non-Indians obtained permits from the State and began to harvest kochia (fireweed) from the bed. The Tribe then intiated this action in the United States District Court for the District of South Dakota against the non-Indians, alleging that they were trespassing upon Indian lands. Subsequently, the State and Charles Mix County intervened as defendants, the individual defendants were dismissed from the suit, and the case proceeded, in essence, as a quiet title action. Pet. App. 3, 12.

On September 19, 1981, the district court entered summary judgment in favor of the Tribe. *Yankton Sioux Tribe v. Nelson*, 521 F. Supp. 463. The court ruled that the Tribe held aboriginal title to the lakebed prior to the 1858 Treaty, that its aboriginal title was not expressly extinguished by the United States, and that, for this reason, title to the lakebed had not passed from the United States to the State, under the Equal Footing Doctrine, upon its admission to the Union. See Pet. App. 3-4.

The court of appeals vacated the district court's judgment and remanded the case without resolving the merits. 683 F.2d 1160 (1982). Rather, noting that the parties were advancing conflicting theories of ownership that depended upon whether Lake Andes was navigable at various times, the court of appeals instructed the district court to make findings concerning the navigability of the Lake at the time of the 1858 Treaty and at the time South Dakota was admitted to the Union in 1889. See Pet. App. 4.

4. On remand, the district court found that Lake Andes was navigable in law and in fact at the relevant times and again entered judgment in favor of the Tribe. 566 F. Supp. 1507 (1983).

In September 1983, while post-judgment motions were pending before the district court, the United States moved to intervene as a plaintiff. The motion to intervene was accompanied by a proposed complaint and cross-claim, in which the United States asserted a property interest in the bed of Lake Andes free from any beneficial interest of the Tribe.[1] The intervention motion was granted by the district court (Pet. App. 12-13), which then again entered judgment in favor of the Tribe (*id.* at 9-33).

Relying upon the judgments entered in two actions brought by the Tribe against the United States pursuant to the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 25 U.S.C. (1976 ed.) 70 *et seq.*, in which the Tribe had recovered awards relating to the lands that it ceded in the 1858 Treaty and the 1892 Cession Agreement, the court first held that the United States was barred by the doctrine of collateral estoppel from contesting the Tribe's claim of aboriginal title to the lakebed as of 1859 (Pet. App. 15-

[1] The United States did not request any determination of the status of its interests vis-a-vis those of the State, nor has the State ever requested any such determination. Hence, the question whether the State or the United States has the better claim to the lakebed is not at issue in this case.

18). The court further held that the Tribe's title to the lakebed had not been extinguished by events other than the 1858 Treaty or the 1892 Cession Agreement, including the United States' establishment and maintenance of the Wildlife Refuge, and that the Tribe had not voluntarily abandoned its beneficial ownership of the lakebed (Pet. App. 18-26). On these grounds, the court concluded that "[t]he Yankton Sioux Tribe of Indians owns the bed of Lake Andes" (*id.* at 33).

5. The State, the County and the United States appealed. The State and County argued that the State had acquired unencumbered title to the lakebed under the Equal Footing Doctrine upon South Dakota's admission to the Union and, in the alternative, that any interest that the Tribe might have had in the lakebed was extinguished by the 1892 Cession Agreement. Although the United States had supported the State's Equal Footing Doctrine argument in district court, it did not renew that argument on appeal.[2] Instead, the United States contended that the 1892 Cession Agreement had extinguished any interest the Tribe might have had in the lakebed and that the United States was not collaterally estopped from challenging the Tribe's claims of ownership.

The court of appeals reversed (Pet. App. 1-8). The court held that, under the Equal Footing Doctrine, the United States, upon acquiring the Louisiana Territory, immediately began to hold lands underlying navigable waters within the acquired territory, including Lake

---

[2] The United States urged that the case instead should be resolved on the "narrow ground" that the 1892 Cession Agreement extinguished any interest the Tribe might have had. The United States further stated: "[W]e note that the Equal Footing Doctrine argument is one that is most appropriately raised by a state itself, rather than by the United States, and that the State of South Dakota is in fact ably making that argument in its own appeal. Hence, there is no need here for the United States to repeat that same argument on its own behalf." U.S. Br. 22 n.14.

Andes, in trust for future States (Pet. App. 4-5). The court found that the Tribe's aboriginal title in the area did not attach until after it was acquired by the Louisiana Purchase (*id.* at 7), and it held that such a claim of aboriginal title arising after the United States acquired the territory in question cannot defeat the State's title. In the court's words: "Even assuming that aboriginal title can ever attach to the bed of navigable waters, we hold that when sovereign title is in place and operation of the equal footing doctrine begins before any claim of aboriginal title has ripened, the state's claim of ownership is preeminent unless a recognized exception to the equal footing doctrine is applicable" (*id.* at 7). Finding no conveyance of the lakebed to the Tribe that was either "explicit or clearly inferrable from the circumstances" (*ibid.*, citing *Montana* v. *United States*, 450 U.S. 544, 551-552 (1981), and *United States* v. *Holt State Bank*, 270 U.S. 49, 54-55 (1926)), the court concluded that the lakebed passed to the State of South Dakota in 1889 under the Equal Footing Doctrine (Pet. App. 7-8). The court therefore found it unnecessary to address any of the other issues presented (*id.* at 8).

ARGUMENT

The court of appeals' conclusion that the Yankton Sioux Tribe holds no present ownership interest in the bed of Lake Andes is correct, and its decision presents no question of general importance warranting review by this Court.

1. The United States has managed Lake Andes as the principal component of the Lake Andes National Wildlife Refuge for almost 50 years. In the court of appeals, the appellants made two independent arguments concerning ownership of the bed of Lake Andes, either of which would fully sustain the United States' right to continue to manage the Lake and its bed as part of the Refuge and would, correspondingly, defeat the Yankton Sioux Tribe's claim of aboriginal title to the lakebed.

First, the United States and the State argued that the Tribe had ceded any interest it had in the lakebed to the United States in the 1892 Cession Agreement. That Agreement necessarily conferred on the United States, at least as against the Tribe, the right to exercise complete control over the lakebed for wildlife conservation or other purposes. Second, the State argued that the Tribe did not have aboriginal title to the lands prior to the Louisiana Purchase in 1803; that after 1803, the United States held the bed in trust, to be conveyed to the future State of South Dakota under the Equal Footing Doctrine; and that aboriginal title could not attach during this period in a manner that would defeat the State's claim under the Equal Footing Doctrine after statehood. Because the State thereafter granted the United States a permanent easement to enable it to maintain Lake Andes as part of a wildlife refuge, the United States succeeded to any interests the State acquired under the Equal Footing Doctrine to the extent necessary to assert control over the lakebed for refuge purposes. Accordingly, under this second argument as well, the Tribe's claim of aboriginal ownership would be defeated.

The United States did not rely in the court of appeals on the second rationale just discussed, but the court of appeals nevertheless adopted it. See pages 6-7 and note 2, *supra*.[3] This rationale presents novel theoretical issues regarding the interrelationship between a State's rights under the Equal Footing Doctrine and a tribe's claim of aboriginal title that attached to the same submerged land after the United States acquired the territory. Petitioner Yankton Sioux Tribe appears to acknowledge that its

---

[3] The court of appeals determined as a factual matter that the Tribe's exclusive occupancy of the area did not begin until after the Louisiana Purchase in 1803 (Pet. App. 6-7). That fact-bound holding does not warrant review by this Court. In any event, the Tribe concedes that "[t]he United States acquired sovereign title to the area in 1803 before the Tribe's use of the area had ripened into aboriginal title" (Pet. 5 n.2).

aboriginal claim, whenever it attached, would not actually defeat the State's *fee title* to the lakebed under the Equal Footing Doctrine, and that the Tribe therefore would have no more than the traditional aboriginal right to use or occupy the lakebed until that right was extinguished by the United States. See Pet. 6-8. Accordingly, as the Tribe suggests (Pet. 7), it might be legally possible for the courts to recognize both the Tribe's aboriginal claim and the State's fee-title claim to the same lakebed.

It might also be that the Tribe is correct that an absolute rule that aboriginal rights can *never* attach to lands underlying navigable waters after the United States acquired the territory would go too far. Thus, we may assume for present purposes that if a tribe moved into a new area on the public domain, the tribe, after the passage of an appropriate period, might be held to have acquired a new homeland on the public domain. By the same token, the United States might be held to have sufficiently acknowledged that new home by some official act. In that event, it would not be unreasonable to conclude that some or all of the tribe's aboriginal rights had been effectively transferred to the new location. And in appropriate circumstances, it is possible that this aboriginal right in turn might extend in some meassure to a navigable body of water and its underlying bed—at least if the water body was sufficiently central to the tribe's way of life at the new location and was regarded as such by responsible federal officials. Cf. *Montana* v. *United States*, 450 U.S. at 556. Even then, however, it would be necessary to reconcile the respective interests of the tribe and the State in order to define the nature and extent of such aboriginal rights, if any, that were thus acquired and that were later retained by the tribe when the fee title to the bed itself passed to the State upon its admission to the Union.

There is, however, no need for the Court to address these difficult theoretical and factual issues in this case. Questions concerning the recognition of aboriginal rights

in lands underlying navigable waters have arisen only rarely in the lower courts. Moreover, as the State argues (Br. in Opp. 7-8), and as the Tribe concedes (Pet. 7-8 nn. 4-5), the Eighth Circuit's treatment of those issues in this case does not directly conflict with the appellate decisions petitioner cites (Pet. 7-8)—*Turtle Mountain Band of Chippewa Indians* v. *United States*, 490 F.2d 935 (Ct. Cl. 1974); *United States* v. *Romaine*, 255 F. 253 (1919); and *Heckman* v. *Sutter*, 119 F. 83 (1902) —because the question whether aboriginal title ripened after the United States acquired the territory was not actually litigated in those cases. See also *United States* v. *Pend Oreille Cty. Pub. Util. Dist. No. 1*, 585 F. Supp. 606, 608 (W.D. Wash. 1984), quoted at Pet. 12 ("The courts have never squarely addresed the question of the competing claims to the same navigable waters by an Indian tribe and a state, where the Indian claim is based on aboriginal title."). Finally, we submit that resolution of the issues the Eighth Circuit chose to address is unnecessary to the outcome of this case, because, as we explain below, the United States' right to control Lake Andes and its bed, to the exclusion of the Yankton Sioux Tribe, is in any event secured by the 1892 Cession Agreement.

2. a. Article I of the 1892 Cession Agreement states that the Indians "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to *all the unalloted lands* within the limits of the reservation set apart to said Indians [by the 1858 Treaty]" (28 Stat. 314 (emphasis added)). The bed of Lake Andes, of course, consisted entirely of unallotted lands. Hence, under the plain language of Article I, whatever interest the Tribe might once have had in the lakebed passed from the Tribe to the United States in 1892. Several considerations reinforce the conclusion that the explicit text of Article I should be given its natural effect of defeating any continuing claim of title by the Tribe.

First, Article I is framed in terms that this Court has repeatedly characterized as "express language of cession." *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, No. 83-2148 (July 2, 1985), Slip op. 15 n.19; *Solem* v. *Bartlett*, 465 U.S. 463, 469 (1984). In *DeCoteau* v. *District County Court*, 420 U.S. 425, 445 (1975) (emphasis added), this Court, in considering a similar and contemporaneous cession agreement, found that the same language was "precisely suited" to the purpose of conveying to the United States, "for a sum certain, *all* of [the Indians'] interest in *all* of their unallotted lands."

Second, the retention of the lakebed by the Tribe would have been inconsistent with the purposes of the 1892 Cession Agreement. Those purposes consisted not only of opening additional lands for non-Indian settlement, but also of paving the way for the anticipated end of the tribal way of life. As this Court stated in *Solem* v. *Bartlett* (465 U.S. at 468 (footnote omitted)):

> Another reason why Congress did not concern itself with the effect of surplus land acts on reservation boundaries was the turn-of-the-century assumption that Indian reservations were a thing of the past. Consistent with prevailing wisdom, members of Congress voting on the surplus land acts believed that within a short time—within a generation at most—the Indian tribes would enter traditional American society and the reservation system would cease to exist.

Finally, there is nothing in the extensive legislative history of the 1892 Cession Agreement to indicate that the parties intended that the Tribe would retain any ownership interest in the bed of Lake Andes. See S. Rep. 196, 53d Cong., 2d Sess. (1894); H.R. Rep. 570, 53d Cong., 2d Sess. (1894); S. Misc. Doc. 134, 53d Cong., 2d Sess. (1894). If such an exception had been intended, it is reasonable to expect some mention of that fact in the

account of the negotiations contained in the legislative history.

b. The Tribe cites (Pet. 9-10) several post-1892 statutes that it believes support the contention that it owns the lakebed. Those statutes, however, do not support the Tribe's position. In 1896 and 1906, Congress passed two measures appropriating funds for the purpose of enabling the Secretary of the Interior to "put down an artesian well or wells at or near Lake Andes, on the Yankton Indian Reservation * * * for the purposes of supplying said Indians with water for domestic purposes, for stock, and for irrigation purposes" (Indian Appropriations Act of 1896, ch. 398, 29 Stat. 343; Indian Appropriations Act of 1906, ch. 3504, 34 Stat. 371). It is apparent from the text of the Acts that their purpose was to provide a source of water for Indian allotments located upland of Lake Andes. Hence, those statutes shed no light on the question of the ownership or use of lands underlying the Lake itself.

Thereafter, in 1922, Congress enacted a statute authorizing the Commissioner of Indian Affairs to construct and maintain a spillway to stabilize the Lake's maximum elevation. Act of Sept. 21, 1922, ch. 358, 42 Stat. 990. The legislative history of this provision shows that its purpose was to prevent the flooding of adjacent farmlands, including lands "held by Indians under Government restrictions," from the rising waters of Lake Andes. See H.R. Rep. 1073, 67th Cong., 2d Sess. (1922). The 1922 Act thus likewise does not suggest that the Tribe retains aboriginal ownership of the bed of Lake Andes.

3. For the foregoing reasons, it is clear that the 1892 Cession Agreement terminated any ownership interest that the Tribe then had in the bed of Lake Andes.[4] Accord-

[4] The district court found that the United States was precluded by collateral estoppel "from litigating the issues of aboriginal title and the Cession Agreement of 1892" (Pet. App. 15-16). The district court relied upon the judgments entered in two Indian Claims

ingly, even if the tribe once had an interest in the lakebed that survived South Dakota's admission to the Union in 1889, any such interest was promptly extinguished in 1892. Accordingly, the judgment of the court of appeals, which rejects the Tribe's claim of a *present* ownership interest in the lakebed, is clearly correct. The decision below therefore does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DAVID C. SHILTON
ROBERT L. KLARQUIST
Attorneys

MAY 1987

Commission proceedings in which the Yankton Sioux Tribe recovered awards relating to the lands that it had ceded in the 1858 Treaty and the 1892 Cession Agreement (*id.* at 16-17).

Plainly, however, neither of the two Commission judgments barred the United States from challenging the Tribe's ownership of the lakebed in this case. The action regarding lands ceded by the 1858 Treaty, *Yankton Sioux Tribe* v. *United States*, 24 Ind. Cl. Comm. 208 (Docket No. 332-C), aff'd, *Sioux Tribe* v. *United States*, 500 F.2d 458 (Ct. Cl. 1974), was based on a claim for compensation only for lands outside of the exterior boundaries of the reservation established by that Treaty. Because Lake Andes was within the reservation boundaries, the lakebed was not at issue in that action. The second Commission judgment, entered in *Yankton Sioux Tribe* v. *United States*, aff'd, *Yankton Sioux Tribe* v. *United States*, 623 F.2d 159 (Ct. Cl. 1980) (Docket No. 332-D), involved a claim seeking compensation for lands ceded under the 1892 Cession Agreement. However, as the Tribe conceded below (Br. 32), it specifically framed its claim so as to *exclude* the bed of Lake Andes. See 623 F.2d at 183; Pet. App. 17. As a result, no question concerning the lakebed was placed in issue in that case. In any event, collateral estoppel would not bar the State from asserting an interest in the lakebed, since the State was not a party to the proceedings before the Indian Claims Commission.

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1581

STATE OF SOUTH DAKOTA, PETITIONER

v.

YANKTON SIOUX TRIBE AND DARRELL E. DRAPEAU

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case concerns the boundaries of the Yankton Sioux Indian Reservation. Those boundaries affect the United States' law enforcement authority under the Indian Major Crimes Act, 18 U.S.C. 1153, and other federal statutes that apply only in Indian country. In addition, the United States, because of its special relationship with the Indian Tribes, has a strong interest in protecting the integrity of reservation boundaries and in promoting tribal self-government within those boundaries.

STATEMENT

1. a. In the Treaty of April 19, 1858, 11 Stat. 743 (the 1858 Treaty), the Yankton Sioux Tribe ceded to the United States its aboriginal lands, about 11 million acres, except for a 430,000-acre Reservation in Charles Mix County in southeastern South Dakota. Art. 1 (Pet. App. 100). The Treaty specifically delineated the boundaries of the Res-

ervation, which was said to consist of "four hundred thousand acres." *Ibid.*[1] In return, the United States agreed, among other things, "[t]o protect the * * * Yanctons in the quiet and peaceable possession of the said tract * * * so reserved for their future home." Art. 4 (Pet. App. 102). The Treaty further provided that "[n]o white person," with some exceptions, "shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians." Art. 10 (Pet. App. 108).

b. Toward the end of the 19th century, Congress began to question the policy, reflected in the 1858 Treaty, of setting aside large tracts of land as permanent homes for Indian Tribes. See *Solem* v. *Bartlett*, 465 U.S. 463, 466 (1984); *DeCoteau* v. *District County Court*, 420 U.S. 425, 431 (1975). Congress was faced at that time with a "continuing demand for new lands for the waves of homesteaders moving west," *Solem*, 465 U.S. at 466, but was constrained by treaty provisions that, like Article 10 of the 1858 Treaty, prohibited white settlement on Indian reservations. In addition, Congress believed that the Indians would benefit from "assimilation into American society," which would be accelerated by their "abandon[ing] their nomadic lives on the communal reservations and settl[ing] into an agrarian economy on privately owned parcels of land." *Ibid.*

In response to those concerns, Congress passed the General Allotment Act, commonly known as the Dawes Act, in 1887. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388. The Dawes Act "empowered the President to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit." *DeCoteau*, 420 U.S. at 432. As this Court has

---

[1] A subsequent survey determined that the Reservation actually encompassed some 430,000 acres. See Pet. App. 69.

recognized, while the elimination of Indian reservations may have been Congress's ultimate goal, the actual consequence of allotment was often "to continue the reservation system," at least for the time being. *Mattz* v. *Arnett*, 412 U.S. 481, 496 (1973).

c. By 1892, much of the Yankton Sioux Reservation had been allotted to individual members of the Tribe pursuant to the Dawes Act. Pet. App. 71. In that year, Congress appropriated funds for the Secretary of the Interior "to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress." Act of July 13, 1892, ch. 164, § 1, 27 Stat. 137. The Secretary appointed three commissioners to conduct such negotiations with the Yankton Sioux. Pet. App. 71.

The Commissioner of Indian Affairs in the Department of the Interior instructed the commissioners to attempt to acquire all, or at least some portion, of the Tribe's surplus lands on terms that "should be just and equitable to the Indians as well as the United States." J.A. 99. The commissioners were provided with a form of agreement as "an indication of the views" of the Office of Indian Affairs, but were "not required to adhere to [it] absolutely." J.A. 101 (emphasis omitted).

In an agreement dated December 31, 1892 (the 1892 Agreement), the Tribe ceded to the United States, for $600,000, all of its surplus lands. Arts. I & II (Pet. App. 112-113). As the commissioners noted in their report to the Secretary of the Interior, those lands were "not in one body, but scattered over the reservation and mixed up with the allotted lands of the Indians." J.A. 137.[2] The Agree-

---

[2] The form agreement, which we have lodged with the Clerk of the Court, did not propose to pay the Tribe a sum certain for its lands. Instead, the lands were to be appraised and offered for sale in 160-acre parcels at no less than a specified price per acre. The provision paying

ment reserved from sale to settlers those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes * * * until they are no longer required for such purposes." Art. VIII (Pet. App. 116).

The Agreement, unlike the Office of Indian Affairs form, contained a savings provision, which expressly preserved the Tribe's rights under the 1858 Treaty that created the Reservation:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

Art. XVIII (Pet. App. 120).[3]

---

the Tribe a flat $600,000 for the lands appears to have been adopted for administrative convenience. The commissioners explained that the appraisal option "would accomplish only about one-third of the work which the Government and the Indians desired to accomplish by this transaction," because only the most desirable land would have sold at or above the minimum price then agreeable to the Tribe. J.A. 136. It then "would have been necessary to enter into a new agreement with [the Tribe], reducing the minimum price" when the land failed to sell. *Ibid*.

[3] In addition, the Agreement contained a provision, insisted upon by the Tribe, prohibiting the selling or giving away of "intoxicating liquors" upon "any of the lands by this agreement ceded and sold to the United States" or "any other lands within or comprising the reservations of the Yankton Sioux * * * as described in the [1858] treaty." Art. XVII (Pet. App. 120).

d. Congress "accepted, ratified, and confirmed" the Agreement without change and incorporated it, together with several other surplus land agreements, into an omnibus Indian appropriations act (the 1894 Act). Act of Aug. 15, 1894, ch. 290, § 12, 28 Stat. 319 (Pet. App. 122). The congressional ratification debates raised various concerns about the Agreement, including whether the purchase price was too high and whether the Indians should be paid only when, or if, the lands were sold to settlers. J.A. 381-382, 403-427, 437-444. But there was no discussion of whether the Agreement, if ratified, would alter the boundaries of the Reservation.[4]

e. On May 16, 1895, President Cleveland issued a proclamation declaring that "all of the lands acquired from the Yankton tribe" by the 1892 Agreement, aside from those reserved for agency, school, and other purposes, were "open to settlement, under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreement" and all applicable laws. J.A. 456. The proclamation incorporated a "Schedule of Lands within the Yankton Reservation, to be opened to settlement by Proclamation of the President." *Ibid.*

2. In 1993, the Southern Missouri Recycling and Waste Management District (the Waste District) purchased, from a non-Indian, a parcel of land within the original boundaries of the Yankton Sioux Reservation. Pet. App. 91. The Waste District sought to develop the land as a regional solid waste landfill. *Ibid.* After a hearing before the South Dakota Board of Minerals and Environment, at

---

[4] The Act also included various implementing provisions. See Pet. App. 122-124. Those included a requirement that the sixteenth and thirty-sixth sections of each township on the opened lands be "reserved for common-school purposes" and be "subject to the laws of the State of South Dakota." *Id.* at 123.

which the Tribe opposed the landfill, the Waste District obtained a permit for the project. *Id.* at 91-92.

The Tribe then commenced this suit to enjoin construction of the landfill. Petitioner State of South Dakota was joined as a third-party defendant. Pet. App. 93. After trial, the district court concluded that "Congress did not disestablish or diminish the boundaries of the Yankton Sioux Reservation when it ratified the 1892 Agreement with the Yankton Sioux Tribe." *Id.* at 96.[5]

The court of appeals affirmed. Pet. App. 1-65. The majority acknowledged that the provisions in Articles I and II of the Agreement providing for cession of surplus lands in return for a fixed payment might, in other circumstances, indicate congressional intent to diminish a reservation. *Id.* at 14-15. However, the totality of the 1894 Act's text and legislative history—and, in particular, the savings provision of Article XVIII—did not, in the majority's view, establish that Congress intended to diminish the Reservation. *Id.* at 21, 27, 43-44. The dissent argued that the "cession" and "sum certain" language of Articles I and II alone provided sufficient evidence of diminishment. *Id.* at 44.

SUMMARY OF ARGUMENT

Under the Court's surplus land act jurisprudence, only Congress can diminish an Indian reservation. Its intent to do so must appear in the text of the statute itself or be clear from the surrounding circumstances. A congressional intent to diminish is not found lightly, and any ambiguities must be resolved in favor of the Indians.

The text of the 1894 Act, read in light of those principles, does not evince a clear congressional intent to dimin-

---

[5] At the same time, the district court found that the Tribe had not demonstrated that it had regulatory authority over the landfill project. Pet. App. 96. The Tribe did not appeal that ruling. *Id.* at 6 n.5.

ish the Yankton Sioux Reservation. To be sure, the Act and the Agreement that it ratified contain language of cession and lump sum payment that, without more, has been held sufficient to establish such intent in other cases. But there *is* more in this case. The savings provision contained in Article XVIII of the Agreement, and incorporated by Congress into the Act, declares that "all provisions" of the 1858 Treaty are to remain "in full force and effect." Article XVIII thus preserves the first Article of the Treaty, which sets forth the boundaries of the Reservation. At a minimum, the savings provision manifests sufficient ambiguity as to Congress's intent regarding the reservation boundaries that the matter must be resolved in favor of the Tribe. That conclusion is reinforced by the provisions of the Agreement and the Act that reserve from sale to settlers those surplus lands occupied by the United States for agency, school, and other purposes; that reserve (but do not grant to the State) township sections for school purposes; and that prohibit the introduction of liquor onto the ceded lands or "any other lands within or comprising" the Reservation as delineated in the 1858 Treaty.

Nor do the course of negotiations with the Tribe, the debates on the 1894 Act, and other surrounding events provide the "unequivocal[]" evidence necessary to demonstrate "a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem* v. *Bartlett*, 465 U.S. 463, 471 (1984). Petitioner concedes as much. Pet. Br. 28-29. And tribal members have remained, to this day, a substantial portion of the population within the original reservation boundaries.

Finally, the subsequent treatment of the reservation lands has been "rife with contradictions and inconsistencies." *Solem*, 465 U.S. at 478. However, on two occasions, in 1913 and 1941, when the federal government considered

the issue, it concluded that the Reservation was not diminished. The Court should reach the same conclusion here.

ARGUMENT

THE YANKTON SIOUX INDIAN RESERVATION HAS NOT BEEN DIMINISHED

This Court has recognized that each case involving whether a surplus land act has altered Indian reservation boundaries is unique, because "[t]he effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." *Solem* v. *Bartlett*, 465 U.S. 463, 469 (1984). "[I]t is settled law that some surplus land Acts diminished reservations and other surplus land Acts did not," but instead "simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Id.* at 469, 470 (citations omitted); see *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586-587 (1977) ("The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status.").[6]

In a series of modern decisions concerning the effects of turn-of-the-century surplus land acts, the Court has followed several "well-established legal principles" in as-

---

[6] An Indian reservation does not imply total Indian or federal ownership or control of all of the lands within its boundaries. The term instead refers to the geographical area within which the Tribe's authority over its territory and its members is primary. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973). It also describes an area in which the federal government exercises criminal jurisdiction in matters affecting Indians, see 18 U.S.C. 1151, and in which the services of the Bureau of Indian Affairs are focused. Reservation status does not eliminate all jurisdiction of the State with regard to non-Indians, especially in their relations with other non-Indians. See, *e.g.*, *Strate* v. *A-1 Contractors*, 117 S. Ct. 1404 (1997); *United States* v. *McBratney*, 104 U.S. 621 (1881).

sessing whether such an act has diminished a reservation. *Rosebud Sioux*, 430 U.S. at 586-587; see, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 410-411 (1994); *Solem*, 465 U.S. at 470-472; *Mattz* v. *Arnett*, 412 U.S. 481, 504-505 (1973). The "first and governing principle" is that, "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. The dispositive question, then, is whether "Congress [has] clearly evince[d] an intent to change boundaries." *Ibid.* (internal quotation marks and ellipses omitted). Its intent to do so "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz*, 412 U.S. at 505. The "most probative evidence" of such intent is, of course, the actual language of the surplus land act. *Hagen*, 510 U.S. at 411; *Solem*, 465 U.S. at 470.

Second, while events surrounding the passage of a surplus land act are relevant, they rarely are sufficient, in themselves, to establish that Congress intended to alter reservation boundaries if the act itself is silent or ambiguous. *Solem*, 465 U.S. at 471. It is only when such events "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation" that they can sustain an inference that "Congress shared the understanding that its action would diminish the reservation." *Ibid.*[7]

---

[7] Moreover, the Court has been "careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage." *Hagen*, 510 U.S. at 411. The latter shed far less light on the intent of the Congress that adopted the act.

Third, the diminishment of an Indian reservation "will not be lightly inferred." *Solem*, 465 U.S. at 470; accord *Hagen*, 510 U.S. at 411. Any ambiguities in the surplus land act, its legislative history, or the surrounding context are to be resolved "in favor of the Indians." *Ibid.*; *Rosebud Sioux*, 430 U.S. at 586 ("[D]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."). Accordingly, absent "substantial and compelling evidence of a congressional intention to diminish Indian lands," the Court has considered itself "bound by [its] traditional solicitude for the Indian tribes to rule that diminishment did not take place." *Solem*, 465 U.S. at 472.

No such "substantial and compelling evidence" exists here. The text of the 1894 Act, the circumstances surrounding its enactment, and subsequent events do not demonstrate with the requisite clarity that Congress intended to diminish the Yankton Sioux Reservation.

A. The Savings Provision Of The 1892 Agreement And The 1894 Act Precludes Any Determination That Congress Clearly Intended To Diminish The Reservation

Nowhere in the 1894 Act, the underlying 1892 Agreement, or the records of the negotiations and congressional debates is there any express statement that the Reservation was to be "abolished," "discontinued," "vacated," or otherwise disestablished or diminished. Congress used such language in a number of contemporaneous statutes involving Indian reservations. See *Mattz*, 412 U.S. at 504 n.22 (citing such statutes). It chose not to do so here.

In the absence of such language, provisions in a surplus land act that accept a Tribe's "cession" of reservation lands in return for a sum certain, where unqualified by other provisions, have been held sufficient to create a

strong presumption that Congress intended to diminish a reservation. See *Solem*, 465 U.S. at 470-471; *DeCoteau* v. *District County Court*, 420 U.S. 425, 445 (1975). But no such inference is warranted in a case such as this one, in which the ceded lands were scattered over the reservation (see J.A. 137) and Congress, in the same surplus land act, imposed conditions on the transaction that reasonably may be read as preserving the existing reservation boundaries.

The savings provision in Article XVIII of the 1892 Agreement, which Congress incorporated verbatim into the 1894 Act, contains such conditions with respect to the Yankton Sioux Reservation. Article XVIII begins by expansively providing that "[n]othing in this agreement" —necessarily including the cession and lump sum payment provisions of Articles I and II—"shall be construed to abrogate the [1858] treaty." Pet. App. 120. It then further declares that, "after the signing of this agreement, and its ratification by Congress, all provisions of the [1858] treaty * * * shall be in full force and effect, the same as though this agreement had not been made." *Ibid.* No exception is made for the first Article of the 1858 Treaty, which created the Reservation and delineated its boundaries. *Id.* at 100; see also Treaty, Art. 4 (Pet. App. 103) (recognizing that the Reservation was to be the Tribe's "permanent" home). Nor is any exception made for the other provisions in the Treaty that contemplate tribal self-government within the reservation boundaries.[8]

---

[8] For example, Article 11 of the Treaty recognizes the federal government's authority over "matters of dispute and difficulty between [the Tribe] and other Indians," and thus, by implication, the Tribe's authority over internal matters. Pet. App. 108-109. That same article contains the Tribe's agreement to assist in enforcing federal "treaties, laws, or regulations * * * within the limits of [the] reservation." *Id.* at 109. See *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978) (law enforcement authority over tribal members is an inherent aspect of tribal self-government).

Article XVIII is considerably broader than the savings provisions contained in most other Indian agreements. See Pet. App. 16-18 & n.12, 81 (contrasting language of other agreements). It differs significantly from the more common savings provisions that simply preserve "benefits" or rights created under earlier treaties or agreements "*not inconsistent* with the provisions of this agreement." *Rosebud Sioux*, 430 U.S. at 623 (Marshall, J., dissenting) (quoting Rosebud Sioux agreement, Act of Apr. 23, 1904, ch. 1484, § 1, Art. V, 33 Stat. 255) (emphasis added); see *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 760-761 (1985) (quoting similar savings provision).[9]

Petitioner offers three reasons why Article XVIII should not be read to rebut any presumption created by the cession and lump sum payment language of Articles I and II. Pet. Br. 20-28. None of those arguments has merit.

First, petitioner contends (Br. 21-22) that Article XVIII should be construed solely "to preserve the annuities due the Tribe under the Treaty of 1858." But Article XVIII concludes with a separate clause specifically providing that "the said Yankton Indians shall continue to receive their annuities under the [1858] treaty." Pet. App. 120. Petitioner's proposed construction would render superfluous all of the preceding language of Article XVIII, in contravention of the canon that "[s]tatutes must be inter-

---

[9] None of the other surplus land agreements ratified along with the 1892 Agreement contains a similar savings provision. The agreements with the Cour d'Alene, Alsea, and Yuma Indians contain no savings provision at all. See Act of Aug. 15, 1894, ch. 290, §§ 14-15, 17, 28 Stat. 322-326, 332-336. The agreement with the Nez Perce Indians contains a provision that preserves those portions of earlier treaties "not inconsistent with the provisions of this agreement." § 16, 28 Stat. 331. A brief amicus curiae has been filed by Lewis County, Idaho, arguing that the Nez Perce agreement diminished that Tribe's Reservation. That issue is not before the Court or, indeed, before any court at this time.

preted, if possible, to give each word some operative effect." *Waliers* v. *Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660, 664 (1997); see *United States* v. *Alaska*, 117 S. Ct. 1888, 1918 (1997) ("The Court will avoid an interpretation of a statute that renders some words altogether redundant.") (internal quotation marks omitted).[10]

Second, petitioner contends (Br. 23-24) that Article XVIII, aside from its annuity clause, should be disregarded because it is "ambiguous" or "inconsistent." Principally, petitioner argues that Article XVIII's preservation of "all provisions" of the 1858 Treaty is inconsistent with Articles I and II, because the 1858 Treaty gave the Tribe "possession" of all reservation lands whereas Articles I and II transfer possession of some of those lands to the United States. But the appropriate judicial response to tension between different provisions of the same statute is not to read one of those provisions out of the statute. This Court has stressed that "[s]tatutory construction is a holistic endeavor," which, "at a minimum, must account for a statute's full text." *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (internal quotation marks omitted); see *Federal Power Comm'n* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949) ("If possible, all sections of the Act must be reconciled so as to produce a symmetrical whole."). It is thus essential "to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section," *United States* v. *Menasche*, 358 U.S. 528, 538-539 (1955)

---

[10] Moreover, while the historical materials cited by petitioner (Br. 21-23) demonstrate that some members of the Tribe were concerned at the time of the 1892 negotiations with the preservation of their annuities, they do not suggest that Article XVIII was drafted solely to address those concerns.

(internal quotation marks omitted), as petitioner would do here.

The 1894 Act may readily be construed to give effect to Article XVIII as well as Articles I and II. As the court of appeals recognized, all three provisions may be reconciled by construing the Act as conveying certain real property within the Reservation to the United States, for subsequent sale to non-Indian settlers, while preserving "as much of [the 1858] treaty as possible." Pet. App. 20-21. In other words, the Agreement and the Act may reasonably be read as simply opening the surplus lands for settlement "within established reservation boundaries," *Solem*, 465 U.S. at 470, while preserving those boundaries and the Tribe's right of self-government within them. The Agreement thus modifies only that portion of Article 10 of the 1858 Treaty that excluded white settlers from the Reservation.

We submit that ours is the most plausible "holistic" construction of the Act. But even if petitioner's strained construction, which essentially reads Article XVIII out of the Act, were deemed equally plausible, our construction must prevail. At a minimum, Article XVIII renders the Act sufficiently ambiguous that the diminishment question must be resolved in favor of the Tribe. See *Hagen*, 510 U.S. at 411; *Rosebud Sioux*, 430 U.S. at 586.

Finally, petitioner notes (Br. 26-28) that the Court did not accord significance to savings provisions in holding against diminishment in *Solem* or in favor of diminishment in *DeCoteau*. But the Court's silence is hardly surprising, given that neither the parties to those cases nor the United States as amicus curiae based their arguments on any savings provision. Nor did they have reason to do so. The surplus land act at issue in *DeCoteau* did not even contain a savings provision. See 420 U.S. at 455-460 (reprinting agreement as ratified). And the savings pro-

vision in *Solem*'s surplus land act was weaker than the one here. See Act of May 29, 1908, ch. 218, § 9, 35 Stat. 464 ("nothing in this Act shall be construed to deprive the said Indians * * * of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act").[11] In any event, because each surplus land act case is *sui generis*, turning on the particular "language of the Act and the circumstances underlying its passage," *Solem*, 465 U.S. at 469, no conclusion could properly be drawn from the Court's failure to address a different savings provision in a different surplus land act passed under different circumstances.

B. Other Provisions Of The 1894 Act Do Not Evince A Congressional Intent To Diminish The Reservation

Other provisions of the 1892 Agreement and the 1894 Act reinforce the conclusion, drawn from the savings provision of Article XVIII, that Congress did not clearly manifest an intent to diminish or disestablish the Reservation.

1. *The "agency, schools, and other purposes" provision.* Article VIII of the Agreement reserved from sale to settlers those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes * * * until they are no longer required for such purposes." Pet. App. 116. The Court viewed a virtually identical provision in *Solem* as "strongly suggest[ing]" that Congress did not intend to diminish the reservation,

---

[11] Petitioner also notes (Br. 26-27) that the Court observed in *Montana* v. *United States*, 450 U.S. 544, 548 (1981), that a series of surplus land acts had "reduced" the Crow Reservation. Although not mentioned by the Court, two of those acts contained savings provisions. Act of Mar. 3, 1891, ch. 543, § 31, 26 Stat. 1042; Act of Apr. 11, 1882, ch. 74, § 1, 22 Stat. 43. However, given that the construction of the surplus land acts was not at issue in *Montana*, the Court's statement has no relevance here.

because "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened areas would remain part of the reservation." 465 U.S. at 474. The same is true here.

2. *The "school sections" provision.* The 1894 Act contains a provision (not contained in the underlying 1892 Agreement) excepting from sale to settlers "the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota." Pet. App. 123. Petitioner notes that a provision in the surplus land act in *Rosebud Sioux*, which "grant[ed]" the sixteenth and thirty-sixth sections to South Dakota for common schools, was held to indicate diminishment. See 430 U.S. at 600-602. But the Court's rationale in *Rosebud Sioux* is inapplicable here.

As the Court noted in *Rosebud Sioux*, the enabling act admitting South Dakota to the Union provided that the sixteenth and thirty-sixth sections of each township "are hereby granted to [the] State[] for the support of common schools." 430 U.S. at 599 (quoting Act of Feb. 22, 1889, ch. 180, § 10, 25 Stat. 679). That act further provided, however, that when those sections were "embraced in permanent [Indian] reservations," they "shall not, at any time, be subject to the grants * * * until the reservation shall have been extinguished." *Id.* at 599-600 (quoting § 10, 25 Stat. 679). The Court relied primarily on the legislative history of the *Rosebud Sioux* surplus land act to conclude that its school sections provision was intended to implement the school sections provision of the enabling act, and thus that the surplus land act extinguished the reservation status of the land so as to trigger the grant in the enabling act. See *id.* at 600-601 (quoting statement in congressional reports that school sections provision "is in conformity with the guarantee given to the State of South

Dakota by Congress in the enabling act"). No such legislative history exists here.

Nor does the 1894 Act contain the express "grant" language of the *Rosebud Sioux* surplus land act that was held to have implemented the South Dakota enabling act. To the contrary, the 1894 Act simply "reserve[s]" the sixteenth and thirty-sixth sections from settlement without taking the further step of granting them to the State, as contemplated by the enabling act when an Indian reservation is extinguished. Indeed, if the school sections were granted to the State and the Reservation extinguished, there would have been no need for Congress to provide, as it did in the same clause of the 1894 Act, that those sections "shall * * * be subject to the laws of the State of South Dakota." Pet. App. 123. Accordingly, the most natural reading of the school sections provision is that it simply authorizes the State to operate common schools for Indian and non-Indian students on specified lands within the reservation boundaries. At the very least, petitioner errs in contending that the school sections provision affirmatively supports a finding of diminishment. See *DeCoteau*, 420 U.S. at 445-446 n.33 (discussing similar provision).

3. *The liquor prohibition.* The Agreement and the Act also contain a provision that "[n]o intoxicating liquors * * * shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux * * * as described in the [1858] treaty." Art. XVII (Pet. App. 120). Petitioner notes that the Court held that a liquor prohibition in the *Rosebud Sioux* surplus land act indicated diminishment of the reservation. See 430 U.S. at 613-614. The Court reasoned that Congress must have assumed that the opened lands would no longer be Indian country, and thereby

subject to the existing statute prohibiting liquor in Indian country, because otherwise the provision would have been mere surplusage.

There is, however, an equally plausible explanation for why Congress would have included such a provision in the 1894 Act without intending to diminish the Reservation. The term "Indian country," which was not statutorily defined in 1894, was understood to exclude all lands held by non-Indians, even if located within reservation boundaries. See *Solem*, 465 U.S. at 468.[12] It was thus uncertain whether such lands would continue to be covered by the general statute banning liquor in Indian country. Special provisions like that contained in the 1894 Act eliminated any such uncertainty.

It is noteworthy as well that the liquor prohibition in the 1894 Act applies not to the opened lands alone, but to *all* lands within the original reservation boundaries, including lands held by the Tribe that indisputably would

---

[12] The term "Indian country," currently defined in 18 U.S.C. 1151, can be traced back to early statutes regulating Indian affairs. In the Indian Intercourse Act of 1834, Congress designated as Indian country all land west of the Mississippi River, not including Missouri, Louisiana, and the Arkansas Territory, and all land east of the Mississippi that was not part of any State, "to which the Indian title has not been extinguished." Ch. 161, § 1, 4 Stat. 729. Changing historical circumstances rendered that definition obsolete. In 1874, the compilers of the Revised Statutes omitted any statutory definition of Indian country, while leaving intact the numerous statutory provisions that used that term. From 1874 to 1948, the task of defining Indian country was left to the judiciary. In the early part of this century, the Court issued a series of decisions that form the basis for Section 1151. See 18 U.S.C. 1151 note. Thus, Section 1151 was, in part, an outgrowth of *Donnelly* v. *United States*, 228 U.S. 243 (1913), which eliminated the requirement that Indian country "be confined to land formerly held by the Indians, and to which their title remains unextinguished." *Id.* at 269. "Only in 1948," with the enactment of Section 1151, "did Congress uncouple reservation status from Indian ownership." *Solem*, 465 U.S. at 468.

remain subject to the general statute banning liquor in Indian country. Congress thus appears to have been concerned simply with adopting a clear, specific, and *permanent* ban on the selling or giving away of liquor anywhere within the Reservation.[13]

Significantly, moreover, because the Act prohibits liquor on "the lands by this agreement ceded and sold to the United States" as well as "any *other* lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the [1858] treaty" (Pet. App. 120) (emphasis added), the Act appears to contemplate that the ceded lands would remain "within" the Reservation. The liquor provision in *Rosebud Sioux* contained no such description of the surplus lands as being within the reservation.

Petitioner apparently reads the liquor prohibition's reference to the 1858 Treaty as simply an identification of which lands were subject to the prohibition, not as an indication that all such lands would retain their reservation status. But that is not the most natural reading. It is further undermined by the background of the liquor prohibition, which was included in the 1892 Agreement only because the Tribe had "demand[ed]" it. J.A. 154-155.[14] The commissioners explained that the Tribe had made it an "imperative condition" of the sale of its surplus lands "that whisky should be excluded," because the Tribe "fear[ed] that upon the opening of the Yankton Reserva-

---

[13] The 25-year liquor prohibition in *Rosebud Sioux* similarly applied to "lands allotted" and "those retained or reserved," as well as to "the surplus land sold, set aside for town-site purposes, granted to the State of South Dakota, or otherwise disposed of." Act of May 30, 1910, ch. 260, § 10, 36 Stat. 451.

[14] That was not the case with the liquor prohibition included 16 years later in the *Rosebud Sioux* surplus land act. See 430 U.S. at 611 (provision recommended by Secretary of Interior).

tion to settlement by white people, drinking saloons would be established in their midst." J.A. 154. That account conveys a clear sense that the Tribe believed that the Reservation would retain its identity and Indian character. The commissioners endorsed the Tribe's condition in terms that reinforce that understanding: they expressed the "hope that Congress will fix a penalty for the violation of this provision which will make it most effective in preventing the introduction of intoxicants *within the limits of the reservation*." J.A. 154-155 (emphasis added).[15]

Thus, far from supporting a finding of congressional intent to diminish the Reservation, as petitioner asserts, the liquor prohibition, like the school sections provision, affirmatively supports a contrary finding. But even if the school sections and liquor provisions were the same as those in *Rosebud Sioux*, the Court has since made clear that such provisions are "suspect" as "independent evidence of a congressional intention to diminish." *Solem*, 465 U.S. at 475 n.18.

C. Events Surrounding The 1894 Act Do Not Evince A Congressional Intent To Diminish The Reservation

The events surrounding the negotiation of the 1892 Agreement and the adoption of the 1894 Act do not demonstrate the requisite clear intent to diminish the Yankton Sioux Reservation. *Mattz*, 412 U.S. at 505. Indeed, petitioner essentially concedes (Br. 28) that such intent could not be established based on contemporaneous events alone.

1. *The 1892 negotiations.* The record of the negotiations with the Yankton Sioux contains none of the sorts of

---

[15] Congress responded by including penalties for the introduction of liquor "upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the [1858] treaty." Pet. App. 124.

statements by federal negotiators or tribal members that, in other cases, have been found to reflect a widely held understanding that a reservation was to be diminished. In *Rosebud Sioux*, for example, the Court noted the federal negotiator's statement to the Tribe that its cession of certain lands "will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation." 430 U.S. at 591-592. Similarly, the Court noted in *Hagen* that the federal negotiator had informed the Tribe that "after next year there will be no outside boundary line to this reservation." 510 U.S. at 417. And in *DeCoteau*, the Court noted a tribal spokesman's acknowledgment that the reservation "was given us as a permanent home, but now we have decided to sell." 420 U.S. at 436-437 n.16.

No similar understanding that the Yankton Sioux Reservation was to be diminished can be discerned from the statements cited by petitioner. See Pet. Br. 29-30. Commissioner Cole's assertions that "[t]he reservation alone proclaims the old time and the old conditions," and that "[t]he tide of civilization * * * requires the sale of these surplus lands and the opening of this reservation to white settlement," are fully consistent with an intent to open surplus lands to non-Indian settlement within existing reservation boundaries. Commissioner Brown's statement that "[t]he time is past when you could stay in your present condition" likewise does not suggest any immediate extinguishment of the Reservation. He may simply have been expressing the view that the Tribe must have greater contact with non-Indian society in order to achieve the goal of self-sufficiency contemplated by the 1858 Treaty. Nor does the recognition by the commissioners and tribal members that the Agreement would effect a "sale" of surplus lands (see Pet. Br. 29) suggest any

understanding that the reservation boundaries would thereby be altered.

Other contemporaneous statements suggest, if anything, that the commissioners and the Tribe did *not* understand that the Reservation would be diminished. In their final report to the Secretary of the Interior, for example, the commissioners observed that the Agreement would bring about "[t]he settlement *of the reservation* by white people." J.A. 150 (emphasis added). And in a letter to one of the commissioners shortly after the Agreement was signed, Reverend Williamson, a missionary who was well-regarded among the Yankton Sioux, found "no cause of apprehension that this agreement will *in any way* interfere with the treaty of 1858." J.A. 317-318 (emphasis added).

2. *The congressional debates.* The congressional debates on the 1894 Act fail to demonstrate any intent to diminish the Reservation. The discussions focused primarily on the fiscal consequences of the government's agreeing to pay a sum certain for the surplus land at the outset rather than to pay only when, or if, the land was sold to settlers. See J.A. 406-427, 437-444. As Representative Pickler of South Dakota, a member of the Indian Affairs Committee and a supporter of the Agreement, stated during the House debates:

> The only question is whether we will settle up with the Indians now or keep books with them and pay them hereafter as the lands are sold, supposing they would so agree.

J.A. 427; see J.A. 432 (Rep. Maddox, an opponent of ratification, agrees that "[t]he question is whether we are willing to advance the money"). Nothing in the record indicates that Congress believed that the answer to that question would affect the future boundaries of the Reservation. See Pet. App. 15-16 ("the House debate" and

other contemporaneous statements "all show that a sum certain price was included for reasons other than issues of jurisdiction and sovereignty").

Petitioner identifies no statement during the congressional debates that expressly addresses the status of the reservation boundaries. Instead, petitioner relies (Br. 31-32) on statements by two Representatives that the opened lands would become part of the "public domain." See J.A. 380, 386 (Reps. McRae and Hermann). However, isolated floor statements referring to the "public domain," especially when no such references appear in the text of the Act itself, shed little light on the diminishment question. See *Solem*, 465 U.S. at 475 & n.17; see also *Hagen*, 510 U.S. at 413.[16]

3. *The Presidential proclamation.* The post-enactment proclamation of the President opening the surplus lands for settlement also indicates that those lands were to remain within the Reservation. The proclamation refers to, and incorporates by reference, a "Schedule of Lands *within the Yankton Reservation*, South Dakota, to be opened to settlement by Proclamation of the President." J.A. 456 (emphasis added). The proclamation further states that the lands were being opened "under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in [the 1892] agreement." *Ibid.* Those "restrictions" and "reservations" necessarily included the Article XVIII savings provision preserving the "full force and effect" of the 1858 Treaty establishing the Reservation.

---

[16] Moreover, another member of Congress expressed the view that the opened lands would "[n]ot necessarily" become a part of the "public domain" upon their purchase by the United States. J.A. 382-383 (statement of Rep. Lynch).

D. Subsequent Events Do Not Establish That The Reservation Was Diminished

The Court has recognized that evidence of the government's subsequent treatment of the lands opened by a surplus land act is of only limited value in assessing whether Congress intended to diminish a reservation. *Solem*, 465 U.S. at 471. It has never been found sufficient, in itself, to establish such an intent. Moreover, where the treatment of the opened lands has been "rife with contradictions and inconsistencies," such evidence is "of no help." *Id.* at 478; see also *Hagen*, 510 U.S. at 420.

The federal government's conduct with respect to the Yankton Sioux Reservation, while not entirely consistent, suggests that no diminishment was intended. Most significantly, on two occasions when the federal government squarely considered the question, it concluded that the Reservation was not diminished.

First, as early as 1913, in its brief in *Perrin* v. *United States*, 232 U.S. 478 (1914), the United States took the position that the Reservation had not been diminished. In arguing the validity of the liquor prohibition contained in Article XVII of the 1892 Agreement, the United States stated:

> And the "Reservation" referred to in Article I [of the Agreement] (as enduring then and after the passage of the act) was necessarily that embraced in the original boundaries of the 400,000 acres [under the 1858 Treaty].

U.S. Br. at 7-8, *Perrin* v. *United States*, No. 707 (O.T. 1913). In other words, the Reservation not only "endur[ed]" after the 1894 Act, but continued to encompass all of the lands within the 1858 Treaty boundaries. See also *id.* at 19-20 (describing ceded lands as within "actual physical boundaries of the reservation"). The petitioner

took the same position. See *Perrin* Transcript of Record at 28.

Second, in 1941, Felix Cohen, then-acting Solicitor of the Department of the Interior and author of the authoritative *Handbook of Federal Indian Law* (1942), issued a carefully considered opinion letter concluding that the boundaries of the Yankton Sioux Reservation had not been changed by the 1894 Act. See 1 U.S. Dep't of Interior, *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs* 1063 (1979). His conclusion rested primarily on the fact that the 1894 Act, in contrast to other surplus land acts, provided for the allotment to tribal members of lands "scattered over all the reservation," rather than "ced[ing] a definite part of the reservation and treat[ing] the remaining area as a diminished reservation." *Id.* at 1064. Solicitor Cohen noted (*ibid.*) that events since the passage of the Act had not undermined his conclusion that the Reservation had not been diminished:

> Since the 1892 agreement there has been no redefinition by Congress of the Yankton Reservation nor determination that the reservation no longer exists. On the contrary, the reservation was referred to as a still existing unit in the acts of April 29, 1920 (41 Stat. 1468), and June 11, 1932 (47 Stat. 300).[17]

---

[17] Petitioner argues (Br. 42-44) that Acting Solicitor Cohen's opinion is inconsistent with opinions issued by other members of the same office. Those opinions, however, either assume diminishment without analysis (see J.A. 492) or were issued by a subordinate officer, an associate solicitor (see J.A. 518). See *Hagen*, 510 U.S. at 420 (rejecting reliance on "merely passing references" to diminishment). The Cohen opinion has never been retracted or superseded. The official position of the Department of Interior remains that the Reservation was not diminished.

We do not dispute that Congress, the Executive, and the federal courts may not always have been consistent in their statements with respect to the status of the Yankton Sioux Reservation. Congress, for example, has occasionally used the term "former" in its post-1894 references to the Reservation. See Pet. Br. 44. More often, however, it has not.[18] While federal officials have sometimes made statements indicating that the Reservation was diminished (see Pet. Br. 41-44), those statements appear to be "merely passing references," and "not deliberate expres-

---

Nor is there any inconsistency, as petitioner suggests (Br. 43), between Felix Cohen's 1941 opinion and his 1942 citation of *Perrin* for the proposition that Congress has the authority to impose "liquor restrictions on lands ceded to [the United States] by the Indians when these lands adjoined Indian country." *Handbook of Federal Indian Law* 353 & n.26. As explained on the next page of that treatise, Cohen was relying on a definition of "Indian country" as "all lands and reservations, Indian title to which has not been extinguished." *Id.* at 354 n.32. Under such a definition, tribal lands purchased by the United States or non-Indian settlers would no longer be Indian country, whether or not within an existing reservation.

[18] See, *e.g.*, Act of Feb. 26, 1896, ch. 31, § 1, 29 Stat. 16 (one-year leave of absence for "settlers who made settlement under the homestead laws upon lands in the Yankton Indian Reservation"); Act of June 10, 1896, ch. 398, § 1, 29 Stat. 343 (appropriation for "artesian well or wells at or near Lake Andes, on the Yankton Indian Reservation"); Act of Mar. 3, 1905, ch. 1479, § 1, 33 Stat. 1068 (authorizing use of "land reserved for agency purposes on the Yankton Indian Reservation" as tribal park); Act of June 21, 1906, ch. 3504, 34 Stat. 371 (appropriation for "artesian well or wells at or near Lake Andes, on the Yankton Indian Reservation"); Act of Feb. 13, 1929, ch. 183, 45 Stat. 1167 (restoration to Tribe of "lands on the Yankton Sioux Indian Reservation * * * now reserved for agency, schools, and other purposes"); Act of July 6, 1954, ch. 463, 68 Stat. 452 (preamble) (authorizing funds for removal and resettlement of "the Indians of the Yankton Indian Reservation" residing on lands taken for water project).

sions of * * * conclusions about congressional intent in [1894]." *Hagen*, 510 U.S. at 420.[19]

Similarly, the federal cases on which petitioner relies (Br. 33-34) neither turned on the diminishment question nor presented any extended analysis of that question. For example, while petitioner asserts (Br. 33) that the diminishment analysis in this case is "controlled" by *Perrin*, the Court had no occasion in that case to decide whether the reservation boundaries had been diminished. The case concerned whether Congress had exceeded its authority in prohibiting liquor sales on lands opened by the 1894 Act. 232 U.S. at 483. The Court concluded that it had not. *Id.* at 485. Accordingly, since the Court did not hold that Congress's authority to prohibit liquor was limited to

---

[19] For example, petitioner notes (Br. 38, 44) the United States' statement 12 years ago in a footnote in a brief that, based on decisions of state courts in South Dakota, the Reservation had been diminished by the 1894 Act. See U.S. Br. at 17 n.10, *United States* v. *Dion*, 752 F.2d 1261 (8th Cir. 1985) (en banc). The boundaries of the Reservation were, however, immaterial to the issue in that case, which instead concerned whether the Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.*, abrogated the Tribe's rights to hunt bald or golden eagles. The court of appeals did not make any determinations regarding reservation boundaries, since the violations had occurred on trust lands, and left unresolved whether the conduct at issue had "occurred on the Yankton Sioux Reservation." 752 F.2d at 1270. Indeed, the defendant tribal members in *Dion* maintained that their conduct had occurred on the "Yankton Sioux Reservation," thereby asserting its continued existence. *Id.* at 1263.

Petitioner also points (Br. 44) to a Federal Register notice in which the Environmental Protection Agency expressed its "belie[f]" that "the State of South Dakota has sufficiently demonstrated that the Yankton Sioux Reservation was disestablished by the Act of 1894." Yet, the very title of that notice—"Notice of *tentative* determination"— indicates that it should not be accorded significant weight. 59 Fed. Reg. 16,647, 16,649 (1994) (emphasis added). In any event, as petitioner acknowledges (Br. 44), EPA has since rejected that tentative belief.

Indian reservations, the Court did not have to decide whether the ceded lands were, in fact, within the Reservation. The Court's description of the ceded lands as "formerly included in the Yankton Sioux Indian Reservation" (*id.* at 480) is merely a "passing reference" that does not indicate any analysis of the diminishment issue. See *Hagen*, 510 U.S. at 420.[20]

To be sure, the State has asserted jurisdiction over the opened lands on the Reservation. See Pet. App. 33, 38. As this Court has recognized, however, such an assertion of jurisdiction, while of "some evidentiary value," is not dispositive of Congress's intent. *Solem*, 465 U.S. at 471. That is particularly so where, as here, there is countervailing evidence from Congress and the Executive Branch.[21]

---

[20] The subsequent federal cases cited by petitioner (Br. 34, 38) merely assumed diminishment, without any independent assessment, and did not turn on the resolution of that question. See, *e.g.*, *Cihak* v. *United States*, 232 F. 551 (8th Cir. 1916) (dicta) (application of Article XVII); *Forman* v. *United States*, 256 F.2d 766 (8th Cir. 1958) (dicta) (allotment claim); *Yankton Sioux Tribe* v. *United States*, 623 F.2d 159, 165 (Ct. Cl. 1980) (dicta) (land and trust fund claims related to 1894 Act); *Weddell* v. *Meierhenry*, 636 F.2d 211, 213 n.2 (8th Cir. 1980) (dicta) (dependent Indian community), cert. denied, 451 U.S. 941 (1981).

[21] Petitioner also cites (Br. 35-36) several opinions of the South Dakota Supreme Court that state that the Reservation was diminished. Some predate this Court's recent decisions clarifying the criteria for assessing diminishment. The rest simply rely, without further analysis, on the earlier opinions. See *State* v. *Williamson*, 211 N.W.2d 182, 183 (S.D. 1973) (analogizing 1892 Agreement to ordinary conveyance); *Wood* v. *Jameson*, 130 N.W.2d 95, 99 (S.D. 1964) (summarily holding that Reservation was diminished); *State* v. *Winckler*, 260 N.W.2d 356, 360 (S.D. 1977) (citing *Williamson*); *State* v. *Thompson*, 355 N.W.2d 349, 350-351 (S.D. 1984) (citing *Williamson*); but see *Cournoyer* v. *Montana*, 512 N.W.2d 479, 479 (S.D. 1994) (referring to "physical confines of the Yankton Sioux Tribe reservation").

In sum, as the court of appeals observed, government entities' treatment of the Reservation has been "mixed." Pet. App. 35. At a minimum, then, one must conclude, as in *Solem*, that the evidence is too "rife with contradictions and inconsistencies" to establish that Congress intended to diminish the Reservation. 465 U.S. at 478.

E. Demographic Patterns Do Not Establish Diminishment

Petitioner relies (Br. 48-49) on demographic patterns as additional evidence of intent to diminish the Reservation. But "[t]here are * * * limits to how far [the Court] will go to decipher Congress' intention in any particular surplus land Act." *Solem*, 465 U.S. at 472. The Court has never held a reservation to have been diminished based on demographic factors alone.

To the extent that demographic evidence can shed any light on the intent of the Congress that adopted a surplus land act, the most probative evidence is from the years immediately after the adoption of the act. Here, such evidence is, as the court of appeals charitably put it, "somewhat incomplete." Pet. App. 41. The 1900 census did not separately identify the population within the boundaries of the Reservation as defined by the 1858 Treaty. It identified only the population of Charles Mix County, less than half of which falls within those boundaries. Those figures show that the County had 1,483 Indian residents and 7,015 non-Indian residents five years after the opening of the Reservation. Even assuming, as did the court of appeals, that the mix of Indians and non-Indians was the same throughout the County, Indians would still have constituted about 40 percent of the population within the original Reservation boundaries. *Ibid.*[22] This is not the

[22] It is reasonable to assume that most Indians lived on the Reservation in 1900, rather than elsewhere in the County. Indeed, at the

sort of situation described in *Hagen* and *Solem*—"an area [that] is predominately populated by non-Indians with only a few surviving pockets of Indian allotments"—that would be probative of congressional intent to diminish a reservation. *Hagen*, 510 U.S. at 420-421; *Solem*, 465 U.S. at 471-472.

Even today, "between 32 and 44 percent of the people within the 1858 boundaries are Indians," depending on whether one uses 1990 census figures or the Tribe's own figures. Pet. App. 42. That is a significantly higher percentage than on the Lake Traverse Reservation, which the Court held to have been disestablished in *DeCoteau*, where Indians constituted only 9 percent of the population. See 420 U.S. at 428. And it is more than twice the percentage of Indians within the original reservation boundaries in *Hagen*. See 510 U.S. at 421. In short, the territory within the boundaries of the Yankton Sioux Reservation has not lost its "Indian character."

---

time of the 1990 census, only eight of the 1,994 Indians in the County lived outside the Reservation. Pet. App. 42-43.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Acting Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BARBARA MCDOWELL
Assistant to the Solicitor General
EDWARD J. SHAWAKER
JUDY RABINOWITZ
TSEMING YANG
Attorneys

SEPTEMBER 1997

Transcript of Oral Argument at 13-21, *Mattz v. Arnett*, 412 U.S. 481 (1973) (No. 71-1182).

[13] ORAL ARGUMENT OF
HARRY R. SACHSE ON BEHALF OF THE
PETITIONER AS AMICUS CURIAE

MR. SACHSE: Mr. Chief Justice, and may it please the Court:

The United States agrees with the position taken by Mr. Sclar and by the petitioner in this case. What I want to try to do is put this 1892 Act into a little bit of historical perspective.

As Mr. Sclar said, the Yuroks always lived in this area. Twice they had their reservation recognized by Executive Order, 1855 and 1891. The 1891 Act was an obvious reaction to the legal problems that had been recognized in the 1889 Court of Appeals case.

In 1892 it may be that the House of Representatives set out to take from these Indians much of what had been theirs. But what the House set out to do, the Senate corrected. And there is a very marked contrast between the Act that was finally passed and the Act that was introduced in the House. The Act as it was finally passed in our view is quite clearly a special allotment Act similar to a number of other allotment Acts that were passed in that general time and which did not terminate the reservation in question.

I would like to first mention something about the [14] General Allotment Act. I think that's important in this. By the 1880's most of the Indian reservations had been created. But there was a pressure by the settlers around those reservations to get some of the land in the reservatons. They felt the Indians were not utilizing that land. And on the other hand there was a pressure to keep faith with the Indians and not to take from them what had

recently been given to them. A sort of compromise was worked out in the General Allotment Act of 1887 called the Dawes Act. It has subsequently been repudiated in the Indian Reorganization Act of 1934. The Dawes Act set up this system, that whenever the President thought it was wise to do so, he could require all the Indians within a reservation to take allotments of a particular number of acres each. This would usually leave considerable land in the reservation that was not allotted. The President then with the consent of the Indians, which it was assumed in those days he could obtain, would open the rest of the reservation for homesteading, but the fees charged to the homesteaders would be used for the benefit of the Indians who lived on the reservation.

Now, that was the General Allotment Act. The General Allotment Act did not require the President to open any particular reservation in this way. And Congress passed a number of special allotment Acts. We have listed those that have been in litigation on page 22 of our brief, Footnote 18. [15] These special allotment Acts would take the matter out of the hands of the President and tribe and Congress would say, "We want allotments made on a particular piece of land. We want, once the allotments are made, we want to open the rest of it to settlement, and we want funds collected from the settlers to be administered by the Government for the benefit of the Indians that lived on that land."

Many of the special allotment Acts made particular reference to the General Allotment Act saying that the allotments would be made under the terms of the General Allotment Act.

It's very significant that the funds obtained in such an Act were to be used for the benefit of the Indians who remained in the reservation. And this meant, of course, a continued Federal involvement with that reservation, both in handling the land transactions and in administering the funds that would be created by this procedure.

In our view, the 1892 Klamath River Act is that kind of special allotment Act. In our brief when we cited the language of the Act, we put in dark provisions, the part added by the Senate, which together with the final paragraph that had been there all along make this Act exactly a special allotment Act of the area of that reservation that was affected.

QUESTION: Ultimately homesteaders' land would be [16] within the reservation?

MR. SACHSE: That's correct.

Now, this Court early—

QUESTION: Would you take the same position even if some was allotted, some was homesteaded and the people and all the restrictions on the allotments had expired and the allotted lands had been sold to whites?

MR. SACHSE: Unless Congress had in some—we don't reach that issue here because there still is allotted restricted land in this reservation.

QUESTION: Well, let me ask you. In an Indian reservation that's along a river, who owns the bed of the river?

MR. SACHSE: Well, in this case, this Court in *Donnelly* has already held that the Indians own the bed of that river. It has never been taken from them.

QUESTION: And that has never been allotted to anybody, has it?

MR. SACHSE: It has never been allotted to anybody. That's still communely held Indian land as far as we are concerned, and there is not a word in the 1892 Act—

QUESTION: Whether the reservation exists or whether it doesn't, and regardless of who owns the river bed, is there some treaty or some law defining Indian fishing rights? Or is it just ancestral fishing rights that have been—

[17] MR. SACHSE: It's somewhere between the two. There were ancestral fishing rights, but this Court in *Donnelly* held specifically that the 1891 Extension that ran

snaking 40 miles down the river was done specifically to preserve the fishing rights that the Indians had.

QUESTION: Which were what?

MR. SACHSE: I think the exclusive rights to fish in that river.

QUESTION: The exclusive right to fish there?

MR. SACHSE: Since it was made an Indian reservation, the purpose of which is that this area is to be reserved for the Indians, and since surplus lands were sold but nothing was done—

QUESTION: You would say, then, I suppose, that since the Indians owned then and still own the bed of the river, that even if all of the riparian land was in other ownership, the Indians would have the exclusive right to fish in the river?

MR. SACHSE: I would say—yes, I would say that. But I don't think this case requires us—

QUESTION: Don't you have to hold that? Because there is some river riparian land that is not owned by the Indians.

MR. SACHSE: Well, here is the way I would analyze this case, but I think what you have raised is also a possible [18] analysis, a possible way to handle the case.

The 1891 Act established an Indian reservation, a mile on both sides of the river including the river and going all the way down to the sea. This Court in *Donnally* held that one of the primary purposes of establishing that reservation was to secure to the Indians fishing rights of that river. That reservation has never been abolished. The 1892 Act which let other people than Indians settle in this area while preserving also Indian settlement, simply did not abolish the reservation. So the reservation is still an area of Federal jurisdiction and protection, except to the extent that Public Law 280 has given the State of California certain criminal and civil jurisdictions in it. Public Law 280 specifically reserves federally granted fishing rights and these were granted by Executive Order as this Court held in *Donnelly*.

QUESTION: That still leaves the question of what—you said "exclusive."

MR. SACHSE: No. Let me say this. The issue was not argued below as to exactly what the consequences of this being held to be an Indian reservation. The court went up on the question it was not a reservation.

QUESTION: The scope of the Indian rights and whether or not the kind of fishing the Indians now want to do is the kind of a fishing right that was historically exercised has not been settled.

[19] MR. SACHSE: That is correct. And we have only asked this Cout to determine the question of whether this remains Indian country, whether this remains an Indian reservation, with a remand after that has been determined to the California courts.

QUESTION: You think that it may be irrelevant whether the reservation exists or not if it's true that the Indians still own the bed of the river.

MR. SACHSE: I don't think it would be irrelevant. I think it would matter from the standpoint of criminal and civil jurisdiction. It would only be irrelevant if the Court were to find that Public Law 280 had granted such total jurisdiction to the State of California that even if it is a reservation all that is left is the ownership of the river. So I think it still is relevant.

I would like to get back to the specific point that this Court is faced with, and that is has this allotment process terminated the reservation. And because I am running out of time, I would just mention this very quickly. That in *United States v. Celestine*, the Court first had to determine this problem, 215 U.S. And in that case the Court held in a careful opinion that the General Allotment Act is inconsistent with termination of a reservation, that allotments under that Act and even disposal of lands to non-Indians does not terminate a reservation. In *United States v. Nice* at 241 U.S.—these [20] are all in our brief—the Court held that a special allotment Act should be interpreted in accordance with, policy in the

General Allotment Act and that a special allotment Act on the Sioux reservation though it required the Sioux to take, on that reservation, allotments, required the President to dispose of the extra land, did not terminate Federal jurisdiction, did not terminate the reservation, did not terminate Federal jurisdiction even as to the land that was disposed of to non-Indians.

This same policy is recognized more recently by this Court in *Seymour v. Superintendent* and also has been codified by Congress in its definition of Indian country as including all the land within the boundaries of an Indian reservation whether patented or allotted or not.

There have been two very recent cases we mention in our brief also, one in the Eighth Circuit, *City of New Town*, and another in the Supreme Court of South Dakota, *State v. Molash*, that had this same consistent interpretation of special allotments Acts indistinguishable from the 1892 Klamath River Act.

In closing, since I assume I am out of time, I refer the Court to page 17 of our brief where we have samples of language that Congress used when it did want to discontinue a portion of a reservation. "The Smith River Reservation is hereby discontinued," Congress said. Or. "The reservation lines [21] of the Ponca and Otoe and Missouria Indian reservations be, and the same are hereby abolished." There has been no confusion between an Act that simply opens the reservation to allotment and settlement and one that abolishes the boundaries of a reservation.

Thank you.

* * * *

Transcript of Oral Argument at 9-24, *Erickson v. Feather decided with DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148).

[9] ORAL ARGUMENT OF
HARRY SACHSE, ESQ., FOR THE
UNITED STATES AS AMICUS CURIAE

MR. SACHSE: Mr. Chief Justice, and may it please the Court:

I want to say a word first about any Indian reservation, before talking about this one, because it seems to me that the discussion so far has been a bit confusing about that.

In almost every Indian reservation in the country there's land that has been allotted to Indians, there's land that has been sold in fee simple to people who are not Indians. There's often a large non-Indian population inside an Indian reservation.

One of the characteristics of this reservation is that there's such a large Indian population inside, and that there's a going tribe, with an organized government and an agency of the BIA, and a very alive and viable situation.

Basically, and without trying to get into all of the details of it, the State in which an Indian reservation is [10] situated has full jurisdiction over non-Indians who live inside an Indian reservation, both civil and criminal jurisdiction. This Court held so in a number of cases, starting in the Nineteenth Century with *McBratney* and *Draper* which were criminal cases. And Justice Frankfurter laid this out in a good deal of detail in *Cake vs. Egan* and the *Metlacotla* cases in about 380—

QUESTION: Is that civil as well as criminal?

MR. SACHSE: Civil as well as criminal.

QUESTION: *Cake v. Egan*—

QUESTION: Irrespective of whether they live on allotted lands?

MR. SACHSE: Irrespective of where they live within the—

QUESTION: But in present actions with an Indian, they're going to be subject to federal law.

MR. SACHSE: Correct. If the transaction is with an Indian or affects the vital interests of the tribe, they're going to be subject to federal law. The exact extent of that is the kind of thing that's still debated before you, in a case such as the *Maserie* case that's under advisement.

QUESTION: And it may be debated eventually in this case, I take it?

MR. SACHSE: And may eventually be debated here.

Now, I think I need to review some law concerning [11] this Treaty as well as—this reservation, as well as the facts.

First, briefly to the facts:

A permanent reservation was established by Treaty in 1867, with surveyed boundaries. And it's this reservation, which is much smaller than the land the Indians had previously had. They had already had their big loss of land, and this was what was left to them, after great amounts of land had been taken away from them.

Then, by an agreement in 1889, made specifically under the General Allotment Act; and at a time when the Indians were in great distress, that the moneys owed to them by the federal government had not been paid to them, it was the middle of winter.

The federal government negotiated with the tribe to do what's known as open its reservation. That is, to allow the sale of surplus land within the reservation. And in this agreement and then in the Act of Congress that ratified it, there are numerous references to the General Allotment Act. There is no such thing as was true with the north half of the Colville Reservation, where a particular part of the reservation was cut off and express language was used, saying that that has been removed from the reservation.

You've heard some talk about the public domain. What's important in this Act is there is no language saying [12] that this was returned to the public domain.

QUESTION: But you do have language of "cession".

MR. SACHSE: You do have language of "cession", that is correct.

QUESTION: Isn't that even stronger?

MR. SACHSE: But there is no specific area ceded, what's ceded is what is not allotted—

QUESTION: But, as a matter of fact, it's treated as the public domain.

MR. SACHSE: I—I don't know what you mean by that.

QUESTION: Well, what happened after the ceded property?

MR. SACHSE: After the property was ceded,—

QUESTION: Yes?

MR. SACHSE: —the government sold that land under—

QUESTION: Treated it like the public domain.

MR. SACHSE: Well, only in the exact same sense that it—

QUESTION: Well, it was handled as part of the public domain, by the same system that the public domain was handled.

QUESTION: Weren't they acting for the Indians?

MR. SACHSE: That is to say—and I'll try to get this in the—I think I may do better to break it down into historical perspective.

[13] But the Indians were paid for the land. How were they paid for it? It was put in the Treasury of the United States, to be used for their benefit. In other words, it's a bookkeeping entry from one government place to another. The money—the Indian Agency was maintained, the money was appropriated by the government as needed for the Indians. The land was opened for homesteading but only for homesteading, not for any purpose.

You have the exact same actual dynamics that occurred in the south half of the Colville Reservation, which this Court held in *Seymour v. Superintendent*, did not abolish that reservation.

The same dynamic that was done in *Mattz v. Arnett*, as to that reservation; namely, the non-Indians got what they wanted, the Indians got what they could. The non-Indians got the right to settle that land. The Indians got the money from the settlement of that land, which was small enough.

The question remaining is: What happened to the federal jurisdiction? What happened to the jurisdiction of the tribe?

And I want to approach that problem now.

QUESTION: Would it be fair to say that the United States in those transactions was acting as the broker for the Indians, to announce publicly that settlers could come in and buy it for $2.50 an acre?

[14] MR. SACHSE: It's exactly so, and we quote in our brief where one of the Senators objected to the cession idea, to the fact that the government would pay the money immediately.

And one of the other Senators explained to him, said: This doesn't mean anything, because this is just a book-keeping transaction in the Treasury. We get right back the money that we're going to pay to the Indians, as we sell off the land.

Now, in some later Acts, the government decided to do it the other way, to not pay the Indians at first, to only pay the Indians as the land was sold.

But the practical effect of both kinds of Acts is identical, that the Indians kept, lived on the allotted land, the unallotted and was opened up for homesteading, because it was thought in this—this was said to the Indians in the negotiations, and the Court talked about this in *Mattz*—this Court talked about this in *Mattz vs. Arnett*.

The excuse for doing this kind of thing was that it was for the benefit of the Indians to do it, that it was better

for them to live next to a high caliber of citizen who would be farming his land, and so forth. That's the kind of language that was used.

And that was the same whether the Indians said they ceded it first, or said—or the government acted as agent, disposing of it.

And, by the way, this language "cession" in the *Ash* [15] *Sheep* case, which we discuss in our brief, is used in connection with an arrangement where the government only acted purely as agent, where they simply—whenever someone wanted a piece of the land, would sell it to him then, and give the money to the Indians. The word "cede" was used.

But obviously with no technical—

QUESTION: What impact, if anything, did the cession have, followed by the sale for homesteading or the settlement for homesteading? What happened as a consequence, or what was the impact with respect to the jurisdiction of the State, if anything?

MR. SACHSE: Of the State? None. None.

The cession of the land or the selling in fee simple of land inside an Indian reservation, say, as in the reservation in *Mattz*—in *Seymour vs. Superintendent*, the south half of the Colville. That then is land owned by a non-Indian inside an Indian reservation.

QUESTION: Well, yes, but you would apparently think the State has civil and criminal jurisdiction over non-Indians on that.

MR. SACHSE: Clearly.

QUESTION: How about the State's trespass law?

MR. SACHSE: The State's—the State's trespass law would clearly apply to non-Indians, but that would be—to the extent that it is applying—

[16] QUESTION: Well, how about to the owner—how about the owner of the deeded land, the ceded land, he now has a fee simple title to it—

MR. SACHSE: Okay.

QUESTION: —and he wants to keep people off his land, and he does it in the name of the State's trespass law. May he do so?

MR. SACHSE: I don't think he could keep an Indian from—

QUESTION: Really?

MR. SACHSE: It seems to me that inside an Indian reservation—

QUESTION: Well, let me talk to them about—

MR. SACHSE: Yes?

QUESTION: —a non-Indian. Can he keep a non-Indian off in the name of the State's trespass law?

MR. SACHSE: Clearly, yes.

QUESTION: So the State's law does apply there.

MR. SACHSE: What I'm saying is that in a transaction between an Indian and a non-Indian—

QUESTION: Well, I didn't ask you about transaction, Mr. Sachse, I asked you about the State's trespass law.

Does the State—after the land is deeded, does the State's trespass law apply to that land?

Certainly it doesn't—

[17] MR. SACHSE: It applies to that land as to non-Indians but not as to Indians.

QUESTION: So an Indian—

MR. SACHSE: The State's criminal law does not apply to Indians inside an Indian reservation.

QUESTION: And so it just—so the State sovereignty just doesn't apply to that land, no matter who it's owned by, as far as keeping an Indian off of it is concerned?

Is that your thesis?

MR. SACHSE: I think that's correct. That would be under federal law or under tribal law, if it's a matter affecting an Indian inside an Indian reservation.

Now, the General Allotment Act left a lot of questions unresolved. And the early questions that were unresolved was whether a reservation existed at all after there had been allotments, and whether even allotted land was Indian land under federal jurisdiction.

And the Court first addressed that question in 1909, in *U.S. v. Celestine,* in which it held that even though land had been allotted to an Indian and patented to the Indian, that the land remained inside the Indian reservation, that no land was removed from an Indian reservation until it specifically removed by Congress from the reservation.

That proposition was extended in 1916, in *United* [18] v. *Nice* which held that the tribal relations of the Indians continues and that federal liquor laws would apply to Indians anywhere within the reservation. But, the important thing was this, that the States were claiming, just as the State claims here, that opening a reservation and alloting lands to Indian meant that federal jurisdiction and tribal jurisdiction would only apply on the allotted lands. This creates several problems, one's the obvious one of having to check plat books to see whose jurisdiction applies where, the other one's even a bit more complicated, these red dots move around, the Tribe buys new land, land can be consolidated. As under a recent act of Congress, this Tribe has an active program of purchasing new land which Congress described as within the reservation. Thereby, again recognizing that the reservation still existed.

QUESTION: Must have been the situation for a good many years?

ANSWER: Thats right.

QUESTION: Hasn't been a great deal of trouble about it, has there?

ANSWER: Well, I think there has. What has really occured is that there has been no law and order on a lot [19]of Indian reservations. And part of the problem has been that the federal government hasn't done its job, the State hasn't done their job, and the tribes have been too weak to do anything.

QUESTION: Well, what is the State's job? What does this State—on an Indian reservation?

MR. SACHSE: In this—in a reservation—

QUESTION: On an Indian reservation, what is the State's responsibility, if any?

MR. SACHSE: The State's responsibility in an Indian reservation is as to non-Indians, to maintain law and order in matters between non-Indians. The federal government and the tribe have responsibility of maintaining law and order in matters that affect Indians.

And neither one of them should have to look at the plat book to do it. It's a question of whether the person is Indian or non-Indian. That's a difficult enough problem, without having to figure out whether a policeman can go on this piece of ground or that piece of ground.

QUESTION: Does a non-Indian ever get in conflict with an Indian?

MR. SACHSE: Yes, and when that happens, that's federal jurisdiction, under 18 U.S.C. 1151. And it makes a good deal of sense for the federal—

QUESTION: Is that generally or is—that's true [20] if it's on a reservation.

MR. SACHSE: If it's on a reservation, that's right.

QUESTION: But not otherwise.

MR. SACHSE: If it's off the reservation, it would —it would not, that's right; it would be State jurisdiction.

QUESTION: In a civil dispute—

MR. SACHSE: No. Excuse me, that's inaccurate. If it's not on Indian country, it would be State jurisdiction. There could be Indian country off a reservation.

QUESTION: Well, yes. Patented land is Indian country by statutory definition; correct?

MR. SACHSE: That's right.

QUESTION: In a civil dispute, under *Williams v. Lee*, isn't a federal question, it's a question for the tribal court, if it's on a reservation.

MR. SACHSE: That's correct. That within an Indian reservation, in a matter affecting Indians, the jurisdiction —the original jurisdiction, the root of the jurisdiction was tribal jurisdiction. But the federal government, through

numerous statutes, has preempted great parts of that jurisdiction. And for all major crimes, for instance, there's federal jurisdiction. But in a civil dispute between an Indian and a non-Indian on an Indian reservation, it's tribal jurisdiction.

That's *Williams vs. Lee.*

[21] QUESTION: Laying aside the major crimes question, and you had a very simple statement that I understood thoroughly for a moment or two there—when you said it desn't depend on geography or plats, it depends on the racial origin.

Now, were you confining that to reservations, as you suggested first, or to Indian country?

MR. SACHSE: I'm—that is true in Indian country. But if you—Indian country is any land inside a reservation. If this Court were to hold this reservation had been abolished by the 1891 Act, which I think would be a very restrictive and artificial interpretation of what the Court's done in *Mattz* and in *Seymour vs. Superintendent,* and I think it would also undercut 18 U.S.C. 1151 seriously. At least for this reservation.

QUESTION: Yes, but go ahead. If the Court should hold—

MR. SACHSE: If the Court should hold that, then each one of these red spots is a little island of federal and tribal jurisdiction, and we're not in a time now when these—

QUESTION: That's the way it's been, isn't it, as my brother White suggested?

MR. SACHSE: The way it's been is that everyone has ignored both the Indian and federal rights there, and this—[22] I don't want to testify, but I don't think the Court should assume that the situation has been good, and that you can assume that because we haven't faced this issue before that it's perfectly all right to leave it another fifty years.

QUESTION: On the other hand, if the Court should decide that the statute, the cession statute didn't amount to a conveyance,—

MR. SACHSE: Yeah.

QUESTION: —then the result would be that the State would no longer have any power to enforce its laws in any of these several counties, if any Indian was involved.

MR. SACHSE: That's correct. It would be a federal question, as in any other Indian reservation,—

QUESTION: Wherever it occurred.

MR. SACHSE: —wherever it occurred, and this is something that Congress has decided is a proper way for the federal government to exercise its—

QUESTION: Well, if this is an Indian reservation.

MR. SACHSE: Yes. And whether this one is or not, it would be the same situation you're describing in other reservations of the State, that clearly are reservations.

We're speaking of the proposition that this, what we call a reservation, where a major tribe lives and where there's a major number of Indians, should be treated like the other Indian reservations in the State.

[23] QUESTION: Well, I suppose the vast proportion —this is something like, what, 27,000 non-Indians and a few, 3,000-plus Indians?

MR. SACHSE: That's right.

QUESTION: In this Lake Traverse area.

MR. SACHSE: That's correct.

But we're not trying to subject the non-Indians to federal or Indian jurisdiction except to the extent needed to fulfill the trust responsibilities—

QUESTION: Which means that whenever they're involved with an Indian—

MR. SACHSE: That's right.

QUESTION: —the State does not have any jurisdiction—

MR. SACHSE: That's correct.

QUESTION: —with respect to its civil, criminal or family or status law.

QUESTION: It was suggested that the tribe had recently passed an ordinance that asserted rather expansive jurisdiction within this area. Is that true or not?

Or do you know?

MR. SACHSE: I haven't seen it. I've heard that that's so. I suspect that it goes beyond the authority that the tribe has.

QUESTION: Because it reaches non-Indians?

[24] MR. SACHSE: Yes.

QUESTION: Well, how do we know that the tribe doesn't have authority to reach non-Indians?

MR. SACHSE: Well, the *McBratney* case and the *Draper* case in criminal matters.

QUESTION: Well, all *McBratney* says is that the State has the right to try a white man for a crime that took place on an Indian reservation. It doesn't say the tribe couldn't try him.

MR. SACHSE: Well, I suppose I just have to answer that this has been the—at least tacit holding of this Court, or assumption of the Court in a number of cases. And I refer to *Cake v. Egan,* where Justice Frankfurter tried to lay out the limits on tribal jurisdiction. And it's never been faced directly in the last ten years, perhaps, by this Court, but it has been faced before.

QUESTION: Well,—

MR. SACHSE: My time is up, and I'm feeling bad about taking all the time of my partner.

MR. CHIEF JUSTICE BURGER: We'll take care of that; you're on our time for a minute or two here.

Mr. Justice White, did you have a further question?

QUESTION: No, I didn't.

MR. CHIEF JUSTICE BURGER: We'll hear from your friend, then.

Transcript of Oral Argument at 18-30, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562).

* * * *

[18] ORAL ARGUMENT OF H. BARTOW FARR, ESQ. ON BEHALF OF U. S. AS *AMICUS CURIAE*

QUESTION: Mr. Farr, before you commence, will you help me understand the facts situation?

The main issue, as I understand it, is the boundary of the Reservation.

MR. FARR: That is right.

QUESTION: The location of the boundary. Who occupies the land within the disputed area? Do Indians still occupy part of it?

MR. FARR: There are Indians within the disputed area but I think the area is largely occupied by whites who purchased or successors of the people who purchased the open lands.

QUESTION: Right. And the principal interest of the Indian Tribe, as I understand it, is whether the Tribe or the state exercises jurisdiction within the disputed area.

MR. FARR: The Tribe and the Federal Government or [19] the state, yes.

QUESTION: Right. Well, who, in fact, has exercised jurisdiction legally? What laws have prevailed within the disputed area in recent years? How far back?

MR. FARR: Well, this is a question which I think the record is unclear on, Mr. Justice Powell. Essentially, the United States, as the United States understands the position—of course, not having been the party to the suit throughout, there has been some exercise of jurisdiction by the state, they having taken the position that this is land outside of an Indian Reservation to which their jurisdiction applies.

QUESTION: Have state criminal laws been imposed or enforced within the disputed area?

MR. FARR: I believe that the state has, you know, gone ahead and imposed state criminal law as well as,

though, I think the Federal Government and the U.S. Attorneys have also imposed some federal law but there has basically been a kind of working relationship in this area.

I am not sure how much of this is reflected by the record but I think as a practical matter that is generally what has been happening.

QUESTION: All right. Just one other question. We are not concerned with the individual title of any particular parcel of land, are we?

[20] MR. FARR: We are not.

QUESTION: Just the boundary of the reservation.

MR. FARR: That is right.

QUESTION: Right.

MR. FARR: Mr. Chief Justice and may it please the Court:

The United States is appearing this afternoon as *amicus curiae* is support of the position of the Rosebud Sioux Tribe that the decision of the Court of Appeals for the Eighth Circuit should be reversed.

We think that under the principles set forth by this Court in previous cases, particularly in *Seymour, Mattz* and *DeCoteau*, that it is clear that the acts of 1904, 1907 and 1910 did not disestablish the boundaries of the Rosebud Sioux Reservation in the areas to which they applied.

I would like to note briefly at the outset one important general point. In suggesting that Congress did not disestablish the boundaries of the Reservation in the early 1900's, we do not mean to imply that Congress expected that those boundaries and the boundaries of comparable reservations were going to continue indefinitely.

We agree that in the early 1900's, Congress contemplated at some period of time that the Reservation system would, in fact, come to an end but we believe that time was when the trust period on Indian allotments expired and the [21] assimilation of Indians and white settlers on the lands had been accomplished.

QUESTION: And in your view, it would have taken an Act of Congress later, then, to—

MR. FARR: That is corect. Congress at some point would have found that the assimilation had occurred and would have passed an Act abolishing the Reservation.

At that point, all of these lands and all of the people on it—except if the Federal Government wished to retain jurisdiction over the Indians—would have gone within state jurisdiction.

In 1934, however, as the Court is aware, Congress reversed that policy when it passed the Indian Reorganization Act and definitely extended the trust period on the Indian allotment.

I will discuss that more briefly in connection with the General Allotment Act of 1887.

Because this case involves an issue of statutory interpretation, the United States does not urge or perhaps even believe it is possible for this Court to lay down a binding fixed rule that would govern construction of acts in all similar cases.

However, we do believe it is appropriate for this Court to reaffirm the principle that except for the language of an act or the compelling legislative history, shows a clear [22] intention by Congress to contract Reservation boundaries and limit federal jurisdiction over certain areas of Indian reservations, that whenever Congress without a binding agreement opens lands to white settlers, it does not pay for them and does not guarantee any payment but only agrees to act as trustee for future uncertain sales and leaves the property interest in the Indians—as they did in this case—that act does not remove the lands from the boundaries of the Reservation.

As this Court said in *Seymour*, discussing an act with very, very similar terms, the purpose of the 1905 Act is neither to destroy the existence of the Reservation nor to lessen federal responsibility or jurisdiction over the Indians having tribal rights on that Reservation.

Now, this principle that Congress did not intend to disestablish the Reservations is not one that the government

has made up out of whole cloth. It is supported both by history and by the previous decisions of this Court.

To begin with, it is well-recognized that the Tribes are entitled to rely on certain rules of statutory construction. In particular, doubtful expressions are to be resolved for the benefit of the Indian.

More particularly, in cases of these types—of this type, the intent to disestablish Reservation boundaries must be made clear, either from the Act or the legislative [23] history and as this Court said in *Rice versus Olson*, the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history. All of these rules of construction apply to the case at hand.

Equally important—

QUESTION: Mr. Farr, may I interrupt you?

MR. FARR: Certainly.

QUESTION: As I understand the geography, we really are not talking about very many Indians because all of the unsold land has been restored to the Indians and all the land which was sold was sold to whites. Isn't that right?

MR. FARR: Well, those facts are true, yes. But in terms of the area in which we are talking about, we are talking about a considerable area of land in which Indians will either be able to move within federal jurisdiction or will be moving within the state jurisdiction and of course, Indians do have allotments within those open areas.

QUESTION: Within the open areas.

MR. FARR: Yes. They do.

QUESTION: But could you clarify one thing? What percentage of the—what portion of this total land was restored in 1934? How much of the original reservation is in dispute?

MR. FARR: I would love to answer that question but I have no idea.

[24] QUESTION: The record does not tell us, I take it.

MR. FARR: No.

QUESTION: But these would be probably noncontiguous parcels, wouldn't they? The would be little islands.

MR. FARR: They are likely to be, right. I mean, depending on the settlement practices and who defaulted and who did not, the lands that would be left available would be likely to be individual tracts. That is correct.

QUESTION: One more last question. Does the record tell us how many Indians live on the lands in dispute?

MR. FARR: I believe that there is a figure stated in one of the opinions below that—I think that the Reservation covers about 7,000. I think that the areas that we are talking about, the counties that we are talking about, the number of Indians is somewhere around 1,600 or 1,700. I think that is reflected in the record.

QUESTION: I see. And those would be Indians that reacquired lands or now occupy lands which were originally—

MR. FARR: Well, not necessarily. Again, they may be Indians who were allotted lands at the time that these areas were opened. When the areas were opened, Indians were first given an opportunity to select allotments within those areas.

QUESTION: Well, wouldn't, by virtue of those allotments, wouldn't that land be Indian country?

MR. FARR: That land is Indian country.

[25] QUESTION: There is no dispute about that.

MR. FARR: No, I don't believe so.

QUESTION: How many Indians occupy land over which there is a dispute? Do we know that?

MR. FARR: I do not know.

QUESTION: And there would be very few, would there not?

MR. FARR: Well, I don't know how many there would be, but I think—I might just say that the principle, I think, extends further than that because jurisdiction, if it only applies on allotments, the Indians, any time they

step off their particular allotments onto territory that is owned by a white settler may at that point be subject to state jurisdiction and that is something that clearly the Indians do not want and which is an interest we feel that we ought to protect in this case.

Turning to the General Allotment Act of 1887 briefly—

QUESTION: In other words, the nonreservation land can be and is Indian country if it is owned by the individual Indians.

MR. FARR: That is correct. That applies in—

QUESTION: And by the same token, or the other side of the same coin, within a Reservation there can be fee simple and non-Indians.

MR. FARR: Well, there can be fee simple and [26] non-Indians in terms of land ownership.

QUESTION: That is what I mean.

MR. FARR: No question. However, for purposes of jurisdiction—

QUESTION: Well, we are talking now about the geographic boundaries of the Reservation.

MR. FARR: That is correct. Now, the definition of Indian country, just to make sure that I have answered your question properly, the definition of Indian country in 1151 includes all areas including patented lands within a Reservation within Indian country and also, Indian allotments outside the boundaries of a Reservation within Indian country.

QUESTION: So within a Reservation, land owned in fee simple by non-Indians is still Indian country.

MR. FARR: That is correct.

QUESTION: Do you know what the relative proportion of whites and Indians is in the area that is disputed?

MR. FARR: If my memory serves me correctly, Mr. Justice White, I think there are somewhere around 16,000 whites and 1,600 Indians.

QUESTION: 16,000 whites and 1,600 Indians.

MR. FARR: I believe that is correct.

We also believe, in addition to the presumptions that I discussed a minute ago, that the General Allotment Act of 1887 has—that the policies and objectives of that are [27] consistent with the principle that an act such as this does not disestablish Reservation boundaries.

Although Respondents in their brief have continually turned the General Allotment Act on its head saying that it embodies the intent of Congress to disestablish Reservations, this Court has considered that precise question in several recent cases and found the opposite intent and we believe the Court correctly identified the intent of the General Allotment Act only last term in *Moe versus Confederated Salish and Kootenai Tribes,* in which you quoted from *Mattz* with approval the following language:

"Its policy, that of the General Allotment Act of 1887, was to continue the Reservation system and the trust status of Indian lands but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the Reservation could be abolished." And that is the Act of Congress that I said in answer to your question, Mr. Justice Rehnquist.

Unalloted lands were made available to non-Indians with a purpose in part of promoting interaction between the races and of encouraging Indians to adopt white ways.

QUESTION: When was that Act?

MR. FARR: That is 1887.

QUESTION: '87.

MR. FARR: Right.

[28] And in fact, Respondents have said that this Sioux Act, in fact, followed along from that general plan.

We think that that indicates that the Court has recognized an intent to retain jurisdiction and control over those lands during the trust period with the consideration of whether to end the Reservation to be made at a later time when the assimilation had occurred and we think the Court has noted that even more specifically in the cases in

which we very heavily rely on in our brief. *Seymour* and *Mattz* and also in *DeCouteau*, which distinguishes both cases in a case where sale was made for a sum certain and an agreement was made, as counsel for the Tribe has discussed.

In addition to these guiding principles, we also feel that the legislative history and the administrative treatment that we have set forth in our brief supports the position of the Tribe.

The remaining question then is, what is there sufficient to override this in the materials that the Court has before it?

Most importantly we call the Court's attention to the fact that there is nothing in the Act that says specifically that jurisdiction over these areas was to be given to the state.

In fact, I think, as a reading of the legislative history shows, Congress was really not concerned with the [29] jurisdiction at this point. The pressure on Congress was to open up lands for white settlers for two reasons, one, the settlers wanted the lands and two, the counties wanted a greater tax base.

Both of those objectives could be met perfectly comfortably by Congress by opening lands within the Reservation boundaries without sacrificing the principles of the General Allotment Act of 1887 which was to continue the Reservation during the period of assimilation.

QUESTION: Well, could the counties tax white-owned lands within the Reservation?

MR. FARR: Yes.

I don't believe that there is any dispute about that, but that was considered at that time and I believe, even now, would be considered land that is within the power of the state to tax.

In *DeCoteau*, in fact, discussing the—this particular conflict of policy the Court said, in 1887, the General Allotment Act was enacted in an attempt to reconcile the government's responsibility for the Indians' welfare with the

desire of non-Indians to settle upon Reservation land and we submit in this case that the best way to reconcile those and the way that Congress did reconcile them throughout this period was to continue the Reservation system but open white lands so that they would have a taxable base for the county and [30] the whites would have the additional lands.

For those reasons, as my time is getting short, I will close and simply suggest that the decision of the Court of Appeals should be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, Mr. Farr.

* * * *

Transcript of Oral Argument at 18-27, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 96-6281).

* * * *

[18]

ORAL ARGUMENT OF RONALD J. MANN
ON BEHALF OF THE UNITED STATES AS
AMICUS CURIAE SUPPORTING THE PETITIONER

MR. MANN: Thank you, Mr. Chief Justice, and may it please the Court:

The question before the Court is whether the provisions of the 1902 and 1905 acts that opened portions of the Uintah Indian Reservation to settlement by non-Indians operated to exclude from the reservation the lands that were opened to settlement.

QUESTION: Mr. Mann, let me ask you the same question that I asked Mr. Seneca. If all we have before us is the language of the 1902 act, speaking of restoration to the public domain, if land had been restored, would the reservation boundary be excluded, in your view? Was that language clear enough under the Seymour case, and DeCoteau, and some of the others?

MR. MANN: We think it's quite clear that the language would not have been sufficient to alter the boundaries of the reservation. The Court's decision—

QUESTION: How do you explain away Seymour and the other cases indicating that that language is [19] sufficient?

MR. MANN: I don't think that those cases do indicate that the language is sufficient. If I could sort of take you through the cases where this Court has referred to public domain language in statutes affecting reservations, the statute at issue in Seymour actually had also been considered by the Court in an earlier case, United States v. Pelican in 1914, but in both cases the key thing to realize is that the statute does not simply say that the land is being restored to the public domain. It states that the reservation is being vacated and restored to the public domain. Now, the word vacate in our mind carries much

more of a connotation of surrender, or cession of the type that has been required in this Court's later decisions, so that doesn't really seem to us to speak to this issue directly.

QUESTION: I would think that that phrase hurts your case rather than helps it. It shows that restored to the public domain means being taken away from the reservation.

MR. MANN: Well, no, actually—

QUESTION: Being vacated and restored to the public domain. It doesn't mean merely that white settlers are going to be allowed to come in. It means it's off the reservation from now on.

[20] MR. MANN: Well, it suggests that the reservation is being vacated, and there are a number of things that can happen when the reservation is vacated. In this particular instance, the land is being restored to the public domain.

I think that the clearest description—

QUESTION: What does that mean, though, and restored to the public domain? What do you think it means in that context?

MR. MANN: Well, the clearest explanation the Court has given in this context is in footnote 17 of the opinion in Solem, where the Court indicated that the phrase could well have referred to the fact that the lands were being made available for sale to non-Indians.

The reference to public lands in Federal statutes has traditionally referred to lands that are available for sale as opposed to lands owned by the United States that had been set aside for some other use, and that's what the Court in the Solem case referred to. The—stated that a reference to public domain in this context was perfectly consistent with a continuing reservation status.

There's no reason why lands could not be within an Indian reservation and be available for sale to non-Indians. That's the exact thing that happened in each of [21] this Court's cases involving surplus land acts in which the Court held a reservation was not diminished.

QUESTION: And you say that that's the meaning of restored to the public domain, land on reservation which is available for purchase to non-Indians is referred to as public domain.

MR. MANN: It doesn't matter whether it's on a reservation or not, but the phrase, public domain, could be understood to refer to lands that are owned by the United States that are available for sale.

QUESTION: Do you have any instance where—you say it could be. Do you have any instances where it has been, other than this statute?

MR. MANN: The statute at issue in Solem, that's what the Court indicated the most likely understanding of the—

QUESTION: That wasn't the operative language there. That was just—

MR. MANN: No, but the Court did hold that the land was on the reservation. That was the holding of the Court, and the statute stated the land was in the public domain, so the legal effect of the Solem decision is that land which Congress had described specifically as being in the public domain, albeit offhandedly, but in an act that Congress enacted and the President signed, stated that [22] that land was in the public domain, and this Court held that it remained on the reservation.

QUESTION: Well, how about the Rosebud case, where the statute said restored to the public domain resulted—

MR. MANN: Now, in that case also, you'll—if you —when you look at the Rosebud opinion, the statute to which you're referring is not the statute that was at issue before the Court, and the reference occurs in a footnote in the facts statement that described how the Rosebud Sioux Reservation came to the size that was at issue before the 1904, 1907, and 1910 acts, and if you actually look at the statute in that case it becomes fairly clear why the

parties before the Court conceded that the statute altered the boundaries of the reservation.

The title of the statute states that its purpose is to divide a portion of the reservation of the Sioux Nation into separate reservations and to secure the relinquishment of the Indian title to the remainder.

QUESTION: Well, was that mentioned in the opinion?

MR. MANN: I'm not sure whether it was or not.

QUESTION: If it wasn't mentioned in the opinion, it doesn't add anything to your argument, it [23] seems to me, to say there were even additional reasons than those mentioned in the opinion for reaching the result.

MR. MANN: Well, the opinion did not necessarily reach the result. The parties conceded that the reservation —that the land in question there has been removed from the reservation, and the Court was simply summarizing the fact that that—that the land in question was no longer part of the reservation because the Great Sioux Reservation no longer existed, and what remained was the Rosebud Sioux Reservation at issue in the case.

And then the Court went on to consider whether the Rosebud Sioux Reservation had been diminished by the statutes at issue there, so we think that was adequately explained by the fact that the parties would have had no possible basis for suggesting the reservation continued in existence in light of the clear purpose of the statute at hand.

QUESTION: Mr. Mann, in deciding whether the public domain language could mean what you claim it does mean, I suppose we look to intent, and there was a reference to congressional intent a moment ago. The conclusion that was stated was that there was no sort of specific indication, specific to the statutes involved [24] here, of congressional intent.

Isn't it fair to say, however, that if we look further into the state of the congressional enactments at the time

of the 1902, 3, 4, 5 acts, that there was very clearly a policy of the United States, an indication of the policy of the United States in effect to end the reservation system, and shouldn't we read the language in light of that broader policy?

MR. MANN: Well, this Court has had a number of cases that have considered surplus land acts from this period of time, and I think it's fair to say that—

QUESTION: And we declined to do that—

MR. MANN: —in all—in all—

QUESTION: —but were we right, or were we wrong?

MR. MANN: No, I think you were right, because the—what's going on here is, the question of whether reservation boundaries were going to be altered at the time had little practical significance, because the question of criminal jurisdiction turned on the definition of Indian country, which at the time turned solely on who owned the land, so when Congress opened the land to settlement by non-Indians, by that very action it was removing at the time the land from jurisdiction. It didn't have to consider whether it was going to alter the [25] reservation boundaries.

Now, what the Court has done is, it's assumed that if Congress intended to alter reservation boundaries, typically Congress would have stated so specifically, and it's looked very closly to the language of the statutes, and it has had a number of statutes where Congress has quite clearly stated that it intended to alter the boundaries of reservation, and those statutes appear in DeCoteau and Rosebud, and if you look at them, they quite clearly state more or less that the land is being ceded, surrendered, and conveyed, and the Indians are—

QUESTION: Well, certainly, saying more or less is really something of an understatement, because I don't recall in either of those cases that the language said, we intend to alter the boundary of the reservation.

MR. MANN: Well, the language in DeCoteau said that the Indians cede, sell, relinquish and convey to the

United States all their claim, right, title, and interest in the land in question, and the statute in Rosebud stated that the Indians cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all the land in question.

It would be rather difficult, I think, to construe that language as language that allowed the Indians to retain sovereignty over the land.

[26] QUESTION: I think you're probably right, but to —I wouldn't say that to—it is paraphrasing the language you just quoted to say, Congress says we intend to diminish the reservation.

MR. MANN: I think it is paraphrasing the language to say that that is unambiguous language of cession of the reservation from the Indian tribe to the United States.

QUESTION: Well, it was cession, but this was not cession. I mean, Congress can proceed in one of two ways, either by getting the tribe to cede it, or, if the tribe does not wish to cede it under Lone Wolf, simply declaring the reservation ended. You would not expect to have the language of cession when there's been no cession, and that's what it is asserted occurred here.

MR. MANN: Of course, the statute in Rosebud was enacted long after Lone Wolf as well, and the Indians are not consenting Congress used the language of cession. That seems to be—that phrase seems to be the phrase Congress used when it intended to alter the boundaries of a reservation.

QUESTION: Well, when it intended to alter the boundaries of the reservation by cession. That much is clear. But still, isn't it the case that in deciding what to make of the less explicit language, the reference to [27] returns to public domain, that we should construe that in light of the overriding congressional policy, which at the time, as I understand it, was to end the reservation system?

MR. MANN: Well, but the policy was that the reservation system would be ended sometime, because Congress anticipated that it would end the reservation system in the future. The concept was not to end the reservation system directly by these particular statutes. The Court has repeatedly said that some of the statutes ended them, and some of them didn't.

QUESTION: Thank you, Mr. Mann.

* * * *

EXCERPT FROM OFFICIAL TRANSCRIPT

PROCCEEDINGS BEFORE
THE SUPREME COURT OF THE UNITED STATES

No. 96-1581

SOUTH DAKOTA,

Petitioners,

v.

YANKTON SIOUX TRIBE, *et al.*

Washington, D.C. Monday, December 8, 1997

* * * *

ORAL ARGUMENT OF BARBARA B. MCDOWELL
ON BEHALF OF THE UNITED STATES,
AS AMICUS CURIAE,
SUPPORTING THE RESPONDENTS

MS. MCDOWELL: Mr. Chief Justice, and may it please the Court:

To start with last things first, we'd like to deal with the jurisdiction over the reservation area subsequent to 1894. One can find in the record annual reports from the superintendent of the Yankton Reservation, from 1895, 1896 and so forth, to 18—to 1906, which I believe is the last report in the record—those reports consistently refer to the reservation as a continuing entity. It's interesting that it doesn't demonstrate any significant change at the time of the opening. There's a notation that the reservation was opened, but there is nothing to suggest that there was a major change in the situation on the reservation at the [44] time.

QUESTION: But there's nothing in there, I take it, to suggest that this kind of jurisdiction was being exercised over either allotted lands or the lands that were conveyed in 18—or under the—under the 1892 agreement?

MS. MCDOWELL: The record is unclear as to whether the State or the Tribe or the Federal Government was exercising jurisdiction over the allotted lands at the time. It appears that the only prosecution that is cited from the early era, one in 1895, may well have been on Indian allocated lands. It does not appear clear from my reading of the record.

More significantly, however, the exercise of criminal jurisdiction by the State was not inconsistent at the time with continued reservation status, as the Court noted in the Yakima case. At the time, it was thought that Indian character of the land went with Indian ownership. And it was also thought that once an Indian received an allotment, under the Dawes Act, the Indian immediately became a citizen of the State and subject to its plenary jurisdiction. That was only changed in 1906, which was some time after the Act at issue here.

QUESTION: A theory which is beautifully in accord with the State's notion that everyone would have [45] assumed that if there's nothing left in a reservation but allotted lands, there's no reservation left.

MS. MCDOWELL: Oh, that's a theory that this Court has subsequently rejected over the last 35 years.

QUESTION: But it fits very nicely with what you say to be the—the—the—the understanding, that—that you can't have a—the reservation went with—with Indian ownership.

MS. MCDOWELL: Oh, the Court has acknowledged that in a number of other cases, including Solem, that at the time, the understanding was that Indian status was a property status, but that Congress disabused everyone of that notion in 1948, and that when we are deciding these disestablishment and diminishment issues, we are looking at reservations as they have been considered after '48, and not as they may have been considered 100 years ago.

QUESTION: Well, how—how—what is the normal now? I take it now differently from before 1906. Imagine a reservation of 50 square miles. On one of those square miles live a group of people who are not Indians, who own their land in fee, and who bought it from the Tribe. Now, what law governs? The law of the State governs those people? I know the tribal land does not govern them. So far, it seems to me from what I've looked up, Federal law governs.

[46] MS. MCDOWELL: State law governs them except in some particular instances that this Court has spelled out.

QUESTION: Why does State law govern? Is it that the Federal Government has somehow, through law, statute or regulation, brought in State law?

MS. MCDOWELL: No. It's because the—I understand it's because the State has plenary jurisdiction over its citizens, wherever they reside.

QUESTION: All right. So, in other words, these towns that are upset—I don't understand they're upset, or maybe they shouldn't be upset, because nothing is going to change for them?

MS. MCDOWELL: That's our position, that things should not change—

QUESTION: Then why is it—I'm back at Justice Kennedy's point—why is it that there's some argument here about building a—some kind of thing in this—waste disposal

or what it is—if the State law governs the same as it would if it were not within the reservation?

MS. MCDOWELL: This was a—a particular issue of the EPA'S authority to delegate primary supervision of landfills to the State. And under that permitting authority, the State excluded Indian reservations, as I understand it.

[47] But as a general matter—

QUESTION: What about—what about taxation?

MS. MCDOWELL: As a general matter, the State may tax its citizens on the reservation. Certainly, it can tax the non-Indian citizens just as it would, whether it was a reservation or not. It may also impose significant taxes, such as property taxes, on the Indians.

QUESTION: So in the absence of a Federal statute that explicitly distinguished between what happens on the reservation or not, everything stays the same, but for the Indians themselves, because they would have certain rights under tribal land, et cetera, if it is a reservation, throughout the reservation that they wouldn't have if it isn't; is that right?

MS. MCDOWELL: With a few limited—

QUESTION: Is that right?

MS. MCDOWELL: —exceptions, Justice Breyer. If an Indian commits a crime—if a—a non-Indian commits a crime against an Indian, if it's reservation land, then Federal law rather than State law governs the prosecution.

The State, in A-1—this Court, in A-1 Contractors—

QUESTION: Well, could—could you enlighten us on what lands continued to be owned by the Tribe as such, [48] as opposed to specific Indians by way of allotment—

MS. MCDOWELL: It's—

QUESTION: —after 1892?

MS. MCDOWELL: It's my understanding that those lands were, for the most part, allocated to individual Indians. However, the Federal Government—

QUESTION: Well, I'm hearing a lot of "for the most parts," and "no," and "there's this other land," and "it's scattered." I mean, what is it? How are we to find it?

MS. MCDOWELL: Well, it appears—

QUESTION: How do we know?

MS. MCDOWELL: —from the record, which is not entirely clear, that there were some lands that were subject to allocation, but the actual allocations were not made until sometime after 1894. There's also the mile square area—

QUESTION: But they've all been made—is there any land that was held continuously by the Tribe as such, as opposed to tribal members, since 1892?

MS. MCDOWELL: It's my understanding that there is this mile square area that's referred to—

QUESTION: A one square mile.

MS. MCDOWELL: But, other than that—although there are trust lands today that are held by the Tribe, [49] it's not clear that any of those lands were trust lands earlier. Perhaps Mr. Abourezk could clarify that, however.

QUESTION: Now, this—this is a totally checker boarded situation?

MS. MCDOWELL: That's correct. And this Court—

QUESTION: That was certainly a factor that resulted in our thinking there was at least diminishment in the DeCoteau case.

MS. MCDOWELL: Well, the Court, in DeCoteau, found total diminishment. But that was a different case, in several respects, from this one. In the first place, of course, there was no savings clause preserving rights under an earlier treaty. In addition, the Court placed a lot of emphasis in DeCoteau on the negotiation history with the Tribe. There were a number of statements of tribal leaders, stating that we understand that the reservation is going to disappear, essentially, that we never understood that we would keep this reservation. Here there are no statements like that suggesting any kind of

common understanding that the reservation was going to be extinguished as a result of the Act.

It's interesting that—

QUESTION: But do you—do you agree with both [50] counsel, it seemed to me, that the choice is either we accept your argument based on Article XVIII or there's a diminishment?

MS. MCDOWELL: That's correct.

QUESTION: That there is no such thing as diminishment applicable on these facts?

MS. MCDOWELL: That's correct. Diminishment seems to be limited to cases such as Rosebud, where there was a selling or a ceding of a part of the reservation, in so many words, as opposed to this sort of situation.

QUESTION: Didn't—

QUESTION: May I ask one—

QUESTION: Didn't Judge Murphy say she thought that—that the disestablishment was the rare thing and the diminishment the usual thing? It's a very—

MS. MCDOWELL: Well, disestablishment is very rare. This Court has only found it in one prior case, DeCoteau. And subsequently, in Rosebud, the Court suggested that disestablishment should be more difficult to find.

QUESTION: But—

QUESTION: Ms.—Ms. McDowell, can I go back? You said—you said Rosebud is different because there it involved conveyance of only part of the reservation, in so many words.

[51] MS. MCDOWELL: Yes.

QUESTION: But this case involves a conveyance of only part of the reservation, in so many words. Namely, the part that was held in fee by the Tribe and not the part that had been allotted. Do you mean that Rosebud involved only a conveyance of part of the tribally owned portion of the reservation, in so many words? Is that what you mean?

MS. MCDOWELL: Well, the language to the statute in Rosebud says "We cede a part of our reservation." That kind

of language wasn't used here. The language was, "We cede our surplus lands." There was no reference to selling off all or part of the reservation.

It should also be noted that the word "cede" didn't have any single—

QUESTION: Well, isn't it true that the—

MS. McDOWELL: —settled meaning in the 19th century; that it was—

QUESTION: Isn't it true, though, that apart from the savings clause and the negotiating history, if you just look at the text of the document, the DeCoteau case is just like this, that if you have—let me just finish one question so you can comment—if you assume that's if everything is allotted, you don't have a reservation. And if you, then assume that all that's left [52] is unalloted land, but then you cede your entire authority over the unalloted lands, what can be left?

I have trouble getting your explanation to that.

MS. MCDOWELL: Several responses. There are other differences between this case and DeCoteau.

QUESTION: I understand the differences: because of the history primarily in the absence of the savings clause.

MS. MCDOWELL: And there are other clauses that are in our Act here that were not in the Act in DeCoteau, such as the reservation of lands for Agency school and other purposes. That was not present in DeCoteau; it is present here.

QUESTION: Thank you, Ms. McDowell.

General Barnett, you have 2 minutes left.

* * * *

Supreme Court, U.S.
FILED
MAY 0 8 2000
CLERK

(4) (2)

Nos. 99-1490 and 99-1683

In the Supreme Court of the United States

STATE OF SOUTH DAKOTA, ET AL., PETITIONERS

v.

YANKTON SIOUX TRIBE, ET AL.

YANKTON SIOUX TRIBE, ET AL., PETITIONERS

v.

MATT GAFFEY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

LOIS J. SCHIFFER
Assistant Attorney General

JAMES C. KILBOURNE
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

32 pp

QUESTIONS PRESENTED

1. Whether the Yankton Sioux Reservation, which this Court held in *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998), had been diminished to the extent of those lands that had been ceded to the United States for sale to non-Indian settlers, has been wholly disestablished.

2. Whether the Yankton Sioux Reservation has been further diminished to the extent of those allotted lands that have passed out of Indian ownership.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	8
A. The court of appeals' holding that the Yankton Sioux Reservation has not been disestablished does not merit this Court's review	9
B. The court of appeals' holding that the Yankton Sioux Reservation has been further diminished does not merit this Court's review	21
Conclusion	27

TABLE OF AUTHORITIES

Cases:

Alaska v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998)	13, 14
Bruguier v. *Class*, 599 N.W.2d 364 (S.D. 1999)	8, 13
DeCoteau v. *District County Court*, 420 U.S. 425 (1975)	13, 14, 18, 19
Hagen v. *Utah*, 510 U.S. 399 (1994)	3, 5, 9, 10, 17, 24, 25
Mattz v. *Arnett*, 412 U.S. 481 (1973)	22, 23
McClanahan v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973)	14
Minnesota v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999)	17
Moe v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976)	24
Montana v. *United States*, 450 U.S. 544 (1981)	24
Oklahoma Tax Comm'n v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991)	14, 16, 20
Oklahoma Tax Comm'n v. *Sac & Fox Nation*, 508 U.S. 114 (1993)	14, 20

Cases—Continued: Page

Rosebud Siooux Tribe v. *Kneip*, 430 U.S. 584 (1977) 5, 22
Solem v. *Bartlett*, 465 U.S. 463 (1984) 3, 5, 6, 9, 10, 17, 23, 24, 27
South Dakota v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998) 3, 5, 9, 10, 12, 17
United States v. *Celestine*, 215 U.S. 278 (1909) 24
United States v. *Dion*, 476 U.S. 734 (1986) 5, 9, 22
United States v. *John*, 437 U.S. 634 (1978) 20
Ute Indian Tribe v. *Utah*:
114 F.3d 1513 (10th Cir. 1997), cert. denied, 522 U.S. 1107 (1998) 5, 25, 26
773 F.2d 1087 (10th Cir. 1985), cert. denied, 479 U.S. 994 (1986) 25

Treaty, statutes and rule:

Treaty of Apr. 19, 1858, 11 Stat. 743 2
Act of Feb. 28, 1891, ch. 383, 26 Stat. 794 2
Act of Mar. 3, 1891, ch. 543, 26 Stat. 989 17
Act of July 13, 1892, ch. 164, 27 Stat. 137 2
Act of Aug. 15, 1894, ch. 290, § 12, 28 Stat. 314 2
Art. I, 28 Stat. 314 ..... 6, 10
Art. II, 28 Stat. 315 ..... 6, 10
Art. V, 28 Stat. 315 ..... 6, 11, 18, 22
Art. VIII, 28 Stat. 316 ..... 6, 10, 17
Art. XI, 28 Stat. 317 ..... 11, 18
Art. XVII, 28 Stat. 318 ..... 6, 11, 17-18
General Allotment Act, ch. 119, 24 Stat. 388 2
18 U.S.C. 1151 ..... 13, 14
18 U.S.C. 1151(a) 13, 16, 20, 24, 25
18 U.S.C. 1151(b) 13, 15
18 U.S.C. 1151(c) 13, 15, 16
18 U.S.C. 1152 14
18 U.S.C. 1153 14
25 U.S.C. 465 19
28 U.S.C. 2106 16

Rule—Continued: Page

Sup. Ct. R.:
Rule 10 ..... 9, 23
Rule 10(a) 16

Miscellaneous:

26 Cong. Rec. 6426 (1894) 12
S. Exec. Doc. No. 27, 53d Cong., 2d Sess. (1894) 12

In the Supreme Court of the United States

No. 99-1490

STATE OF SOUTH DAKOTA, ET AL., PETITIONERS

v.

YANKTON SIOUX TRIBE, ET AL.

No. 99-1683

YANKTON SIOUX TRIBE, ET AL., PETITIONERS

v.

MATT GAFFEY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (State Pet. App. 1-49) is reported at 188 F.3d 1010.[1] The opinion of the district court (State Pet. App. 50-113) is reported at 14 F. Supp. 2d 1135.

[1] References to "State Pet. App." are to the Appendix in No. 99-1490 filed by the State of South Dakota.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1999. The petitions for rehearing were denied on December 8, 1999 (State Pet. App. 114). The State's petition for a writ of certiorari was filed on March 8, 2000. The Tribe's petition for a writ of certiorari was filed on March 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Treaty of April 19, 1858, 11 Stat. 743 (State Pet. App. 115-126), the Yankton Sioux Tribe ceded to the United States its aboriginal lands, comprising about 13 million acres, except for a 430,000-acre Reservation in what is now Charles Mix County in southeastern South Dakota. State Pet. App. 8, 54-55. Subsequently, the United States made allotments of reservation lands to the individual members of the Yankton Sioux Tribe, pursuant to the General Allotment Act, ch. 119, 24 Stat. 388, and the Act of February 28, 1891, ch. 383, 26 Stat. 794. Ultimately, more than 262,000 acres were allotted. State Pet. App. 8 & n.3, 64.

In 1892, Congress directed the Secretary of the Interior to negotiate with the Yankton Sioux for the sale of surplus reservation lands that were not needed for allotments. Act of July 13, 1892, ch. 164, 27 Stat. 137. In December 1892, the tribal leaders signed an agreement (the 1892 Agreement), later adopted by a majority of the Tribe, in which they agreed to "cede, sell, relinquish, and convey" all of their interest in the unallotted lands within the Reservation for $600,000. State Pet. App. 128-129. The unallotted ceded lands totaled approximately 168,000 acres. *Id.* at 64. In 1894, Congress "accepted, ratified, and confirmed" the 1892 Agreement. Act of Aug. 15, 1894, ch. 290, § 12, 28 Stat. 319 (1894 Act) (State Pet. App. 127-140).

2. In *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998), this Court held that the 1894 Act diminished the Yankton Sioux Reservation by severing the unallotted ceded lands from the Reservation. In reaching that result, the Court principally relied upon the "'cession' and 'sum certain'" language in the 1894 Act by which the Tribe ceded all of its interest in the unallotted lands for a sum certain. *Id.* at 344. The Court had previously held that such language creates an "almost insurmountable" presumption of diminishment. *Ibid.*; see *Hagen* v. *Utah*, 510 U.S. 399, 411 (1994); *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984).[2]

The parcel of land at issue in *Yankton Sioux Tribe* was unallotted land ceded to the United States by the 1894 Act. The Court therefore found it unnecessary to decide whether the Yankton Sioux Reservation had been wholly disestablished. The Court explained that "[t]he conflicting understandings about the status of the reservation, together with the fact that the Tribe continues to own land in common, caution us * * * to limit our holding to the narrow question presented: whether unallotted, ceded lands were severed from the reservation." 522 U.S. at 358.

3. On remand, the district court consolidated the original action, *Yankton Sioux Tribe* v. *Southern Missouri Waste Management District* (No. 94-4217), with a new action, *Yankton Sioux Tribe* v. *Gaffey* (No. 98-4042). In the new action, the Tribe sought declaratory and injunctive

---

[2] The Court concluded that "the contemporary historical context," while supporting its conclusion that Congress intended to diminish the Reservation, was "not so compelling that, standing alone, it would indicate diminishment." 522 U.S. at 351. The Court further concluded that the subsequent conduct of the United States, the State, and the Tribe "reveals no consistent, or even dominant, approach to the territory in question," and therefore "carries but little force in light of the strong textual and contemporaneous evidence of diminishment." *Id.* at 356 (internal quotation marks omitted).

relief precluding the State and Charles Mix County from exercising criminal jurisdiction over tribal members on (i) any lands that had been allotted to members of the Tribe, whether or not those lands are now held in trust by the United States for the Tribe or individual Indians, and (ii) those ceded lands that had been reserved from sale to non-Indians under the 1894 Act for Indian agency, school, and other purposes, but that are now held in trust by the United States for the Tribe. The United States, which had previously participated in No. 94-4217 as an amicus curiae, intervened in the consolidated action. State Pet. App. 6-7.

The district court, after taking additional evidence, held that Congress had not disestablished the Yankton Sioux Reservation. State Pet. App. 53. Instead, the court concluded that the 1894 Act had "modified or reconceptualized" the Reservation to consist of all of the lands within its original exterior boundaries that had not been ceded to the United States for sale to non-Indian settlers; accordingly, the Reservation continued to consist of "all of the reservation lands that were allotted pursuant to the allotment acts, as well as the lands reserved from sale for agency, school, and other tribal purposes." *Ibid.* The court based that conclusion on the text of the 1894 Act and the 1892 Agreement, the record of the negotiations between the United States Commissioners and the Yankton Sioux, the materials submitted to Congress in connection with passage of the 1894 Act, and the subsequent treatment of the allotted lands by the United States, the State, and the Tribe. *Id.* at 67-109.

As a consequence of the district court's decision, the original Reservation, which comprised some 430,495 acres, would be reduced to approximately 262,000 acres. State Pet. App. 64. The district court recognized that its decision would create "a checkerboard pattern of jurisdiction," because the Indian allotments were spread throughout the

original Reservation. *Id.* at 109. The court noted that a similar jurisdictional pattern had been approved in *Ute Indian Tribe* v. *Utah*, 114 F.3d 1513 (10th Cir. 1997), cert. denied, 522 U.S. 1107 (1998).

4. The court of appeals affirmed in part and reversed in part. State Pet. App. 1-49. The court agreed with the district court that the Yankton Sioux Reservation had not been disestablished. But the court held that the Reservation had been further diminished to exclude not only the unallotted ceded lands that were the subject of this Court's decision in *Yankton Sioux Tribe* but also those allotted lands that passed out of trust status and are now owned by non-Indians.

a. At the outset, the court of appeals recited the well-settled principles governing the analysis of diminishment and disestablishment questions. First, the court noted that "[c]ongressional intent is the touchstone" for determining whether a reservation has been diminished or disestablished, and thus that land set aside for a reservation retains that status until Congress indicates otherwise. State Pet. App. 26 (citing *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586 (1977), and *Solem*, 465 U.S. at 470). Second, the court noted that Congress's "[i]ntent to diminish or disestablish a reservation must be 'clear and plain'" from the text of the statute, the legislative history, or the surrounding circumstances. *Ibid.* (quoting *United States* v. *Dion*, 476 U.S. 734, 738 (1986)). Third, the court noted that "neither diminishment nor disestablishment will be found lightly," and that any ambiguities in statutes or agreements bearing on the question are resolved in favor of the Indians. *Id.* at 30 (citing *Yankton Sioux Tribe*, 522 U.S. at 344; *Hagen*, 510 U.S. at 411). Finally, the court noted that each statute that is claimed to disestablish or diminish a reservation "must be analyzed individually, its effect depending on the language

used and the circumstances of its passage." *Id.* at 29 (citing *Solem*, 465 U.S. at 469).

b. The court of appeals held that no sufficiently clear expression of Congress's intent to disestablish the Yankton Sioux Reservation could be found in the text of the 1894 Act and the incorporated 1892 Agreement, in the record of the negotiations between the United States and the Yankton Sioux, or in the other materials before Congress at the time of the adoption of the 1894 Act. State Pet. App. 30-41,

The court of appeals observed that Articles I and II of the 1894 Act—the provisions principally relied on by this Court in *Yankton Sioux Tribe*—"refer[] explicitly only to the ceded lands." State Pet. App. 30. The court determined that three other articles of the 1894 Act contemplated some degree of continuing tribal governance over the allotted lands. The court perceived that Article V, which provided for a $50,000 fund that could be used, among other things, for schools, courts, and "other local institutions for the benefit of said tribe," "clearly foresaw continued tribal activity in providing for the needs of the Yankton Sioux." *Id.* at 39. The court viewed Article XVII, which prohibited the sale of liquor "upon any of the lands by this agreement ceded and sold to the United States" and "upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians," as "acknowledg[ing] the continued existence of two distinct categories of land to which different laws might apply." *Id.* at 39-40. And the court read Article VIII, which reserved from sale to settlers those ceded lands "as may now be occupied by the United States for agency, schools, and other purposes," as indicating that "some lands were expected to remain outside of primary state jurisdiction." *Id.* at 40.

The court of appeals likewise found no clear indication of an intent to diminish the Yankton Sioux Reservation in the record of the negotiations between the United States and

the Tribe. State Pet. App. 32-36. The court observed that the United States Commissioners who negotiated the 1892 Agreement had "repeatedly emphasized" to the Tribe that "their primary objective was the purchase of the *unallotted* lands." *Id.* at 33. The court noted that the Commissioners had also "indicated that the tribal leadership would retain some governing powers"; for example, the Commissioners had suggested that the Tribe, after selling its surplus lands, might be able to have the Reservation organized as a separate county, in which the Tribe could govern its own members so long as they obeyed the laws of the State. *Id.* at 34. The court viewed such statements as "suggest[ing] the parties did not intend to disestablish the reservation." *Ibid.* The court further observed that the Commissioners' subsequent report to Congress did not equate the Tribe's sale of the surplus lands with the Tribe's immediate loss of sovereignty over the unceded lands. *Id.* at 36-37. The report instead reflected what the court described as the parties' understanding that "only a portion of the reservation was being separated at that time." *Id.* at 37.

c. The court of appeals nonetheless concluded that Congress intended to diminish the Reservation not only by the land ceded in 1894, but also by any lands that would later pass into the hands of non-Indian settlers. State Pet. App. 43. Accordingly, the court "h[e]ld that the Yankton Sioux Reservation has not been disestablished, but that it has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *Id.* at 47. The court did not point to any express statement in the 1894 Act, the 1892 Agreement, the negotiation records, or the legislative history to support that conclusion. Instead, the court reasoned that the 1894 Act, when "read in its full historical context," contemplated that tribal members would eventually obtain fee title to their allotted lands, gain the ability to sell those lands to non-Indians, and

become subject to the civil and criminal laws of the State. *Id.* at 43. The court also observed that "nothing in [the] text [of the 1894 Act] or the circumstances surrounding its passage suggests that any party anticipated that the Tribe would exercise jurisdiction over non[-]Indians who purchased land after it lost its trust status." *Id.* at 42. The court found additional support for its conclusion in the absence of any evidence that the United States or the Tribe had asserted jurisdiction until the 1990s over formerly allotted lands that were no longer held in trust. *Id.* at 45-46.

The court of appeals did not determine precisely which lands, after excluding the ceded lands and the allotted lands owned by non-Indians, remain within the surviving Yankton Sioux Reservation. The court concluded only that "the land reserved to the federal government in the 1894 Act and then returned to the Tribe" retains its reservation status. State Pet. App. 48. The court remanded the case to the district court for a complete determination of which other lands remain a part of the Reservation. *Ibid.*

ARGUMENT

The court of appeals erred in holding that the Yankton Sioux Reservation has been progressively diminished as formerly allotted lands have passed into non-Indian hands. Nevertheless, the court's decision does not warrant this Court's review, at least not at this interlocutory stage of the case. The court purported simply to apply, to the particular circumstances of this case, the rules of law previously announced by this Court in earlier disestablishment and diminishment cases. The court's decision does not squarely conflict with any decision of this Court or any other court of appeals. Nor, contrary to the State's suggestion, does the decision conflict with the South Dakota Supreme Court's decision in *Bruguier* v. *Class*, 599 N.W.2d 364 (1999). Indeed, the actual holding in *Bruguier*—that allotted lands

within the original Yankton Sioux Reservation that are now owned by non-Indians are not Indian country under 18 U.S.C. 1151—is fully consistent with the actual holding in this case. Neither the Eighth Circuit nor the South Dakota Supreme Court reached any definitive conclusion as to precisely which other lands within the original Reservation retain their status as Indian country. No such lands were at issue in *Bruguier*, and, here, the court of appeals remanded the case for further proceedings on that question. If a conflict should develop between the Eighth Circuit and the South Dakota Supreme Court concerning the Indian country status of particular lands within the original Reservation, or if the Eighth Circuit's decision concerning the progressive diminishment of this particular Reservation should prove to have consequences for other Reservations, there will be time enough for this Court to grant review at a later date.

A. The Court Of Appeals' Holding That The Yankton Sioux Reservation Has Not Been Disestablished Does Not Merit This Court's Review

1. In concluding that the Yankton Sioux Reservation has not been wholly disestablished, the court of appeals applied the standards repeatedly articulated by this Court, see, *e.g.*, *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343-344 (1998), to the particular facts and circumstances of this case. Such a fact-specific application of settled legal standards does not ordinarily merit this Court's review. See Sup. Ct. R. 10.

As the court of appeals recognized (State Pet. App. 26, 29-30), Congress's intent to diminish or disestablish a reservation must be "clear and plain," as reflected in the text of the surplus land Act, the legislative history, and the surrounding circumstances. *Yankton Sioux Tribe*, 522 U.S. at 343-344 (quoting *United States* v. *Dion*, 476 U.S. 734, 738-739 (1986)); *Hagen* v. *Utah*, 510 U.S. 399, 411-412 (1994); *Solem* v.

Bartlett, 465 U.S. 469, 470-471 (1984).[3] There is no expression of congressional intent, much less the "clear and plain" expression required by this Court, to disestablish the Yankton Sioux Reservation.

The primary purpose of the 1894 Act was to transfer unallotted surplus lands from the Yankton Sioux Tribe to the United States. That transfer was accomplished by Articles I and II of the 1894 Act—the provisions that this Court principally relied upon in *Yankton Sioux Tribe*—which provided for the cession of the surplus lands and established the amount of payment for those lands. See 522 U.S. at 344-345. Those articles refer only to the unallotted surplus lands, not to the lands that were to be allotted to tribal members.

No other provision of the 1894 Act offers any clear indication that Congress intended that the cession of the unallotted lands would result in the disestablishment of the entire Reservation. Indeed, several provisions of the 1894 Act and the incorporated 1892 Agreement point to the opposite conclusion.

Article VIII of the 1894 Act reserved from sale to non-Indian settlers those lands ceded by the Tribe to the United States "as may now be occupied by the United States for agency, schools, and other purposes." 28 Stat. 316 (State Pet. App. 132). This Court recognized in *Yankton Sioux Tribe* that Article VIII "counsels against finding the reservation terminated," because Congress probably would not have reserved lands for such purposes if it had not anticipated a continuing Reservation. 522 U.S. at 350; accord *Solem*, 465 U.S. at 474. The court of appeals similarly viewed Article VIII as reflecting "Congress' expectation that the

---

[3] The Court has also stated that the inquiry into disestablishment or diminishment may, "to a lesser extent," be informed by "the subsequent treatment of the area in question and the pattern of settlement there." *Yankton Sioux Tribe*, 522 U.S. at 344 (quoting *Hagen*, 510 U.S. at 411).

federal government would continue to have a significant presence in the area for the welfare of the Tribe," so that "some lands were expected to remain outside of primary state jurisdiction." State Pet. App. 40.

Article XVII of the 1894 Act prohibited the sale or offering of intoxicating liquors "upon any of the lands by this agreement ceded and sold to the United States" *and* "upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the [1858] treaty." 28 Stat. 318 (State Pet. App. 136). As this Court observed in *Yankton Sioux Tribe*, Article XVII "thus signal[s] a jurisdictional distinction between reservation and ceded land." 522 U.S. at 350; see State Pet. App. 40 (observing that Article XVII "acknowledged the continued existence of two distinct categories of land to which different laws might apply").

Article V of the 1894 Act provided a mechanism for funding, from interest due the Tribe on proceeds from the sale of ceded lands, various post-cession tribal activities, such as the care of "orphans, and aged, infirm, or other helpless persons of the Yankton tribe," schools and educational programs, and "courts of justice and other local institutions for the benefit of said tribe." 28 Stat. 315 (State Pet. App. 130). Article XI provided an additional source of funding of those activities from the sale of lands of tribal members who died intestate. 28 Stat. 317 (State Pet. App. 133-134). The court of appeals recognized that those provisions, which "clearly foresaw continued tribal activity in providing for the needs of the Yankton Sioux," militate against a determination that Congress intended to disestablish the Reservation. State Pet. App. 39.[4]

---

[4] As the court of appeals noted (State Pet. App. 39), the fund referred to in Articles V and XI was never actually established.

The record of the negotiations of the 1892 Agreement between the United States Commissioners and the Yankton Sioux likewise provides no indication of an intent to disestablish the Reservation. The Commissioners repeatedly informed the Tribe during the negotiations that they had one primary purpose—to purchase the Tribe's unallotted surplus lands. State Pet. App. 33-34 (citing S. Exec. Doc. No. 27, 53d Cong., 2d Sess. 48 (1874)). That purpose was consistent with the continued existence of a Reservation consisting of the allotted lands. The Commissioners also indicated that the Tribe would retain some governing powers after the cession, suggesting to the tribal members, for example, that "after you sold your lands, you could have this reservation organized as a separate county," and thus "you could govern your own people in your own way, so long as you obeyed the laws of the State." *Id.* at 34 (quoting S. Exec. Doc. No. 27, *supra*, at 48). The court of appeals observed that the Yankton Sioux could have interpreted such statements to mean that the cession would not alter the Tribe's control over lands retained by the Indians. The court viewed such statements, which it characterized as "references to a continuing tribal government," as suggesting that "the parties did not intend to disestablish the reservation." *Ibid.*

The negotiation records were submitted to Congress by the Secretary of the Interior to support the ratification of the 1892 Agreement. State Pet. App. 33. The congressional debates on the ratification did not address the status of the allotted lands within the Yankton Sioux Reservation. See, *e.g.*, 26 Cong. Rec. 6426 (1894) (statement of Rep. Pickler of South Dakota) ("We simply provide in this bill how these 168,000 acres of land acquired from the Indians shall be disposed of."); cf. *Yankton Sioux Tribe*, 522 U.S. at 353 (observing that "[t]he legislative history itself adds little" even with respect to the status of the ceded lands).

In sum, the court of appeals correctly concluded that no clear indication of congressional intent to disestablish the Yankton Sioux Reservation could be found in the text of the 1894 Act and the 1892 Agreement, in the legislative history, or in the surrounding circumstances. State Pet. App. 41. No reason exists for this Court to revisit that conclusion.[5]

2. The State contends (Pet. 11-20) that the court of appeals' decision conflicts with the South Dakota Supreme Court's recent decision in *Bruguier* (State Pet. App. 141-172), and with this Court's decision in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975). The State is mistaken.

a. Contrary to the State's assertion of a conflict between the decision below and the South Dakota Supreme Court's decision in *Bruguier*, the actual holdings of the two cases are identical—*i.e.*, that allotted lands within the exterior boundaries of the original Yankton Sioux Reservation that are now owned by non-Indians do not constitute "Indian country" under 18 U.S.C. 1151, and consequently that the State, not the United States and the Tribe, has primary jurisdiction over crimes committed on those lands.

Section 1151 identifies three categories of land that qualify as Indian country: reservations (18 U.S.C. 1151(a)), dependent Indian communities (18 U.S.C. 1151(b)), and allotments that remain in trust or restricted status (18 U.S.C. 1151(c)). The question whether territorial jurisdiction rests with the United States and the Tribe, on the one hand, or the State, on the other, turns on whether the land in question is Indian country, not on the particular category of Indian country into which the land is classified. See, *e.g.*, *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S.

---

[5] As discussed below (pp. 21-27, *infra*), although the court of appeals did err in concluding that the Reservation was further diminished to the extent of allotted lands that have passed out of Indian hands, that aspect of the court's decision likewise does not merit review.

520, 526-527 & n.1 (1998). That is expressly so under 18 U.S.C. 1151-1153 with respect to criminal jurisdiction, the principal subject of concern in this case and *Bruguier*. And the definition of Indian country in 18 U.S.C. 1151 "generally applies to questions of civil jurisdiction" as well. *Native Village of Venetie*, 522 U.S. at 527; *DeCoteau*, 420 U.S. at 427 n.2.[6]

In *Bruguier*, the defendant was convicted of a state criminal offense for committing a burglary in Pickstown, South Dakota, which is within the exterior boundaries of the original Yankton Sioux Reservation. He subsequently sought habeas corpus relief, claiming that the offense occurred in Indian country, and thus that the State lacked jurisdiction over him. The parties stipulated that the offense occurred on allotted land to which Indian title had been extinguished. State Pet. App. 142-143. In denying habeas relief, the South Dakota Supreme Court reasoned that the 1894 Act disestablished the Yankton Sioux Reservation. But the court's actual holding was limited to the narrower issue presented in the case: whether the land on which the offense was committed constituted Indian country, and thus whether primary jurisdiction over the defendant's crime rested with the United States and the Tribe or, alternatively, with the State. The court acknowledged the limited scope of its holding, stating at the outset of its opinion: "Here we must decide the status of *allotted* lands, which have passed into non-Indian ownership." *Id.* at 142.

---

[6] For example, the same general principles of immunity from state taxation apply on any land that constitutes Indian country, whether the land is a formal reservation, see *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973); is held in trust for a Tribe but is not part of a formally designated reservation, see *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); or is an allotment still held in trust or restricted status, see *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993).

The court then concluded that allotted lands that now are owned by non-Indians do not constitute Indian country. *Ibid.*[7]

The court of appeals in this case likewise held that formerly allotted lands that now are owned by non-Indians "are not part of the Yankton Sioux Reservation and are no longer Indian country." State Pet. App. 47. Accordingly, under the holdings of both the South Dakota Supreme Court and the Eighth Circuit, the State had primary jurisdiction over the offense at issue in *Bruguier* and indeed over offenses on *all* allotted lands that have passed out of trust status and are now in non-Indian ownership. Thus, as to those lands, which total approximately 222,000 of the 262,000 acres of allotted lands on the Reservation (see State Pet. 5), the Eighth Circuit and the South Dakota Supreme Court agree that the lands are *not* Indian country.

Nor is any disagreement evident between the Eighth Circuit and the South Dakota Supreme Court with respect to the Indian country status of other lands within the original exterior boundaries of the Yankton Sioux Reservation. The South Dakota Supreme Court in *Bruguier*, for example, recognized that lands that are held in trust by the United States for the Tribe or its individual members are Indian country. See State Pet. App. 153, 155, 167, 171-172. The Eighth Circuit, while remanding for a determination of which trust lands remain part of the diminished Reservation, did not dispute that all such lands are Indian country. It is

---

[7] No question was presented in *Bruguier* as to whether the land at issue was a "dependent Indian communit[y]" under 18 U.S.C. 1151(b), and the parties stipulated that the land was not an "Indian allotment[], the Indian title[] to which ha[d] not been extinguished," under 18 U.S.C. 1151(c). See State Pet. App. 142-143, 153-154. Nor was the court of appeals in this case presented with any question as to whether any lands within the original Yankton Sioux Reservation constitute dependent Indian communities.

irrelevant *why* lands held in trust by the United States for the Tribe or its individual members are Indian country—*i.e.*, whether, as the South Dakota Supreme Court appeared to believe, the lands taken into trust for the Tribe since 1894 are Indian country because they are "informal" reservations under 18 U.S.C. 1151(a), see *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991), and the allotments held in trust for individual Indians are Indian country under 18 U.S.C. 1151(c), or whether, as the Eighth Circuit appeared to believe, the tribal trust lands and the allotments that remain in trust status are Indian country because they are the remnants of a "formal" (*i.e.*, the original) reservation. The essential point at this stage is that both courts agree that the allotted lands that have passed out of trust status and are now in non-Indian ownership *are not* Indian country, while both courts have indicated (but not yet definitively held) that all lands held in trust for the Tribe or individual Indians members within the boundaries of the original Reservation *are* Indian country.[8]

The decision of the court of appeals in this case thus does not present a true conflict—*i.e.*, a "conflict[] with a *decision* by a state court of last resort," Sup. Ct. R. 10(a) (emphasis added)—of the sort that warrants this Court's review. This Court reviews "judgment[s], decree[s], or order[s]" of lower courts, not the reasoning upon which such judgments, decrees, or orders are based. 28 U.S.C. 2106.

b. The court of appeals' decision also does not conflict with this Court's decision in *DeCoteau*, which held that another South Dakota Reservation, the Lake Traverse

---

[8] The resulting jurisdictional pattern—with federal and tribal jurisdiction over individual allotments and parcels of tribal trust land—is essentially the same as that involved in a number of this Court's decisions, including *DeCoteau*, *Citizen Band Potawatomi Tribe*, and *Sac & Fox Nation*.

Reservation of the Sisseton-Wahpeton Tribe, had been disestablished.

This Court has cautioned against automatically extending a decision holding that one reservation was disestablished or diminished to another reservation, explaining that the "effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." *Hagen*, 510 U.S. at 410 (quoting *Solem*, 465 U.S. at 469); see also *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (rejecting, as contrary to "basic principles of treaty construction," the argument that "similar language in two Treaties involving different parties has precisely the same meaning," because "the historical record" and "the context of the treaty negotiations" must be examined "to discern what the parties intended by their choice of words"). Here, the text of the surplus land Act and the circumstances surrounding its enactment differ, in several significant respects, from those in *DeCoteau*.

As for the statutory language, although both surplus land Acts provide for a cession of surplus lands for a sum certain, the 1894 Act concerning the Yankton Sioux Reservation contains provisions that do not have counterparts in the Act of March 3, 1891, ch. 543, 26 Stat. 989 (1891 Act), that ratified the agreement with the Sisseton-Wahpeton Tribe. The 1891 Act did not have a provision analogous to Article VIII of the 1894 Act, which reserved from sale to settlers those surplus lands occupied by the United States for Indian agency, school, and other purposes. 28 Stat. 316; see *Yankton Sioux Tribe*, 522 U.S. at 350 (stating that such a provision counsels against finding the Reservation disestablished). The 1891 Act also did not have a provision analogous to Article XVII of the 1894 Act, which expressly prohibited the sale of liquor on both the newly ceded lands and on "any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians." 28

Stat. 318; see *Yankton Sioux Tribe* (suggesting that such a provision draws a "jurisdictional distinction" between ceded lands and reservation lands). Nor did the 1891 Act have provisions analogous to Articles V and XI of the 1894 Act, which provided a mechanism to fund schools, courts, and "other local institutions for the benefit of [the] tribe." 28 Stat. 315, 317. Accordingly, the 1894 Act, in contrast to the 1891 Act, contemplated a continuing role for the United States and the Tribe in the area and a jurisdictional distinction between ceded and other reservation lands.

As for the surrounding circumstances, the Sisseton-Wahpeton expressed their understanding, with a clarity that the Yankton Sioux did not, that the cession of their surplus lands and the allotment of their remaining lands would terminate the Reservation. For example, the Court noted that spokesmen for the Sisseton-Wahpeton Tribe had stated that "[w]e never thought to keep this reservation for our lifetime," 420 U.S. at 433; that "[w]e don't expect to keep [the] reservation," *ibid.*; and that "[t]his little reservation * * * was given us as a permanent home, but now we have decided to sell," *id.* at 436-437 n.17. As the court of appeals observed, "[t]he background of the Lake Traverse agreement was very different from that of the 1894 Act, * * * because the tribal members there had expressed their clear desire to terminate their reservation." State Pet. App. 23.

Finally, the Sisseton-Wahpeton Tribe negotiated for substantially more allotted acreage per capita than was provided by the General Allotment Act or was received by the Yankton Sioux under the 1894 Act. The General Allotment Act, pursuant to which the allotments to the Yankton Sioux were made, provided that heads of household were to receive 160 acres, single persons over 18 or orphans were to receive 80 acres, and other persons were to receive 40 acres. State Pet. App. 61. In contrast, each Sisseton-Wahpeton *member*, "regardless of age or sex," received a 160-acre

allotment. *DeCoteau*, 420 U.S. at 435; see also *id.* at 438 n.19 (quoting the Senate Committee Report on the Sisseton-Wahpeton agreement as explaining that "the departure from the general allotment act of 1887 in the case of these Indians is just and proper," principally because "the additional allotments are in lieu of any residue which, under their title, these Indians could have reserved for the future benefit of their families"). The court of appeals thus recognized that the agreement in *DeCoteau* differed from the agreement here, because the Sisseton-Wahpeton, "in exchange" for the termination of their Reservation, "negotiated allotments for each individual, including married women." State Pet. App. 23. The Yankton Sioux did not.

In sum, given the significant differences in the language of the surplus land Acts involving the Yankton Sioux Reservation and the Lake Traverse Reservation as well as in the circumstances surrounding their enactment, no conflict exists between the decision below and this Court's decision in *DeCoteau*.

3. The State finally asserts (Pet. 20-26) that the court of appeals erroneously concluded that three types of trust land "retained, or may have retained, reservation status": (i) the so-called "agency lands," which were ceded to the United States under the 1894 Act but reserved for Indian "agency, schools, or other purposes," were later returned to the Tribe, and are now held in trust by the United States for the benefit of the Tribe; (ii) any allotted lands that remain in trust; and (iii) any lands acquired by the United States since 1934 and held in trust for the Tribe or individual Indians pursuant to 25 U.S.C. 465. No issue concerning the status of such lands warrants the Court's review at this time. Indeed, the court of appeals explicitly deferred any determination with respect to the status of two of the three categories of trust lands identified by the State. State Pet. App. 48.

The court of appeals made only one definitive ruling with respect to trust lands: that "the land reserved to the federal government in the 1894 Act and then returned to the Tribe continues to be a reservation under [18 U.S.C.] 1151(a)." State Pet. App. 48. The court did not articulate its rationale for that determination. Contrary to the State's suggestion (Pet. 20-22), however, the court of appeals' determination is consistent with decisions of this Court. In *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 511, the Court considered the status of lands that were not within the boundaries of a formally recognized Reservation but that were held in trust by the United States for the benefit of the Tribe. The Court concluded that, because the trust land was "validly set apart for the use of the Indians as such, under the superintendence of the Government," the trust land "qualifie[d] as a reservation." *Ibid.*; see *United States* v. *John*, 437 U.S. 634, 649 (1978) (observing that "[t]here is no apparent reason why these [trust] lands, which had been purchased [by the United States] in previous years for the aid of those Indians, did not become a 'reservation,' at least for purposes of federal criminal jurisdiction at that particular time"); see generally *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (recognizing that Indian reservations, for purposes of 18 U.S.C. 1151(a), may be either "formal" or "informal").

It is thus of no present consequence whether, as the State contends, the agency lands were necessarily severed from the Reservation in 1894. Nothing in this Court's decisions, including *Yankton Sioux Tribe*, precludes such lands from subsequently gaining reservation status if taken into trust by the United States for the benefit of the Tribe. The State's assertion (Pet. 21) that the court of appeals' ruling with respect to the agency lands "contradicts the direct holding of *Yankton Sioux Tribe*" is therefore erroneous.

The State's concerns with respect to other categories of trust lands are premature. Because the court of appeals could not determine from the record or from counsel at oral argument what other trust lands remain within the original boundaries of the Yankton Sioux Reservation, the court remanded the matter to the district court "to make any necessary findings relative to the status of Indian lands which are held in trust." State Pet. App. 48. Indeed, in describing the court of appeals' decision as providing that such trust lands "may" or "might" possess reservation status (Pet. 20, 22, 24, 25), the State effectively concedes that questions concerning the status of those lands are not ripe for this Court's review. And for that reason, even if the Court were to grant the State's petition and agree with the State that the original Yankton Sioux Reservation was disestablished by the 1894 Act, the case would not furnish a suitable vehicle for definitively resolving the Indian country status of all lands within the boundaries of the original Reservation.

B. The Court Of Appeals' Holding That The Yankton Sioux Reservation Has Been Further Diminished Does Not Merit This Court's Review

We agree with the Tribe that the court of appeals erred in holding that the Yankton Sioux Reservation has been further diminished to the extent that allotted lands have passed out of Indian ownership. But we did not ourselves seek certiorari on that issue because, on balance, we concluded that the court's decision, while of undeniable significance to the parties here, is not of sufficiently general significance to warrant this Court's review, at least not at this interlocutory stage of the case. We adhere to that judgment now.

1. The court of appeals correctly recognized that "[c]ongressional intent is the touchstone for analyzing whether the 1894 Act altered the status of the nonceded lands," State

Pet. App. 26 (citing *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586 (1977)); that Congress's intent to diminish or disestablish a reservation must be "clear and plain," *ibid.* (quoting *Dion*, 476 U.S. at 738); and that such intent must be "expressed on the face of the Act or be clear from the surrounding circumstances and legislative history," *ibid.* (quoting *Mattz* v. *Arnett*, 412 U.S. 481, 505 (1973)). This Court has consistently invoked those same principles in determining whether a particular reservation has been diminished.

The court of appeals, however, did not apply those principles correctly to the facts of this case. The court did not identify any language in the 1894 Act or the 1892 Agreement that "clear[ly] and plain[ly]" evinces an understanding that allotted lands would be separated from the Yankton Sioux Reservation when they passed out of trust status and were sold to non-Indians. Nor did the court identify such language in the negotiation records or the other legislative history. Cf. State Pet. App. 37 (noting that the U.S. Commissioners' reports on the negotiations with the Yankton Sioux "do not * * * mention any transfer of the Yanktons' tribal sovereignty").

Rather, the court of appeals relied on provisions of the 1894 Act, "read in its full historical context," that anticipated that tribal members would eventually receive fee title to their allotments, gain the ability to sell the allotments to non-Indians, and become taxpaying citizens of the State. State Pet. App. 42-43. For example, the court noted that Article V of the 1894 Act, which provided for a fund to support "local institutions for the benefit of [the] tribe," stated that the fund would be distributed once the Yankton Sioux "shall have received from the United States a complete title to their allotted lands, and shall have assumed all the duties and responsibilities of citizenship." *Id.* at 39, 42 (quoting 28 Stat. 315). The court viewed Article V as "contemplat[ing] a future in which such a fund would not be

needed," *id.* at 39, presumably because tribal members, as citizens, would then have access to state institutions. Such provisions do not, in our view, provide the requisite "clear and plain" indication of Congress's intent to diminish the Reservation.

We submit that the court of appeals' holding on the diminishment issue, while erroneous, is not erroneous in a manner that requires this Court's review at this time. The Eighth Circuit's disposition of the diminishment issue, like its disposition of the disestablishment issue, involves nothing more than the application of settled principles of law to the particular facts of this case. This Court rarely grants certiorari where, as here, the court of appeals' error appears to consist solely of "the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

2. The Tribe contends that the court of appeals' decision on the diminishment issue conflicts with various decisions of this Court and with a decision of the Tenth Circuit. We do not, however, perceive any square conflict with any of the decisions cited by the Tribe.

a. The court of appeals' holding that the Yankton Sioux Reservation has been further diminished does not, as the Tribe suggests (Pet. 9-14), conflict with any decision of this Court. To the extent that the Tribe relies on this Court's cases that presented diminishment claims, those cases concerned different reservations, different statutes opening those reservations to non-Indian settlement, and different circumstances surrounding the enactment of those statutes. See, *e.g.*, *Solem*, 465 U.S. at 472-481 (1908 Act opening the Cheyenne River Sioux Reservation for homesteading did not diminish the Reservation, but simply permitted non-Indians to settle within existing reservation boundaries); *Mattz*, 412 U.S. at 494-506 (1892 Act opening the Klamath River Reservation for homesteading did not diminish that Reservation). As noted above, the Court has repeatedly recognized that

the question whether a reservation has been diminished turns on the particular "language of the Act [opening the Reservation to settlement] and the circumstances underlying its passage." *Solem*, 465 U.S. at 469; accord *Hagen*, 510 U.S. at 410.

Other cases cited by the Tribe did not concern, as does this case, whether the original reservation boundaries continued to exist. Those cases instead concerned whether persons or activities on lands indisputably within the existing reservation boundaries were subject to regulation by the United States, the State, or the Tribe. See, *e.g.*, *Montana* v. *United States*, 450 U.S. 544, 557-567 (1981) (Crow Tribe had no authority to regulate non-Indian fishing and hunting on reservation lands owned in fee by non-members of the Tribe); *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-483 (1976) (State had no authority to impose personal property tax on Indians residing within the Flathead Reservation, to impose license fee on Indians conducting tribal business within the Reservation, or to impose sales tax on sales by Indians to Indians within the Reservation; State could require Indian retailers to collect tax on sales to non-Indians within the Reservation); *United States* v. *Celestine*, 215 U.S. 278, 283-291 (1909) (United States had authority to prosecute a murder committed by an Indian on a trust allotment within the Tulalip Reservation). No conflict exists between the holdings of those cases and the holding of the Eighth Circuit in this case.[9]

---

[9] The Tribe also suggests (Pet. 15-17) that the decision below conflicts with 18 U.S.C. 1151(a), which defines Indian country to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." The court of appeals did not acknowledge any tension between Section 1151(a) and its holding that the Yankton Sioux Reservation was diminished by the sale of former allotments to non-Indians. The court may have viewed Section 1151(a) as not applying to the threshold question,

b. Nor does the court of appeals' decision conflict, as the Tribe suggests (Pet. 20-22), with the Tenth Circuit's decision in *Ute Indian Tribe* v. *Utah* (*Ute Indian Tribe II*), 114 F.3d 1513 (1997), cert. denied, 522 U.S. 1107 (1998). As explained below, *Ute Indian Tribe II* arose in unusual circumstances that are not presented here.

In *Hagen* v. *Utah*, the Court held that the Uintah Reservation had been diminished as a result of 1902 and 1905 statutes that allotted lands within the Reservation to members of the Ute Indian Tribe and restored the remaining lands to the public domain. 510 U.S. at 421-422. The Court thereby resolved a conflict between the Tenth Circuit's decision in *Ute Indian Tribe* v. *Utah* (*Ute Indian Tribe I*), 773 F.2d 1087 (1985) (en banc) cert. denied, 479 U.S. 994 (1986), which held that the Reservation had not been diminished, and subsequent decisions of the Utah Supreme Court holding that the Reservation had been diminished. See *Hagen*, 510 U.S. at 408-409 (noting conflict).

While *Hagen* was pending, the Ute Indian Tribe moved in district court to enjoin the State from exercising jurisdiction on lands within the Uintah Reservation in a manner incon-

---

presented in this case, of what "the limits of [an] Indian reservation" are. The court may instead have viewed Section 1151(a) as applying only after such limits have been ascertained (and thus as not precluding a determination that Congress intended that the limits of a particular Reservation would change with the transfer of fee-patented land out of Indian hands). Section 1151(a), if construed in such a manner, would not conflict with the decision below. We are aware of no decision of this Court or any court of appeals squarely accepting or rejecting such a construction of Section 1151(a). If the decision below proves to have a broader impact with respect to other existing Reservations where allotments have passed out of trust status, there will be time enough for this Court to grant review, either in this case after the proceedings on remand or in another case holding that the issuance of a fee patent to a parcel of allotted land and the subsequent sale of the land to a non-Indian removed the land from reservation status notwithstanding 18 U.S.C. 1151(a).

sistent with *Ute Indian Tribe I*. After this Court decided *Hagen*, the district court, which considered itself bound to enforce the mandate in *Ute Indian Tribe I* as the law of the case, invited the Tenth Circuit to recall the mandate. See *Ute Indian Tribe II*, 114 F.3d at 1519- 1520.

The Tenth Circuit modified its mandate only with respect to the portion of *Ute Indian Tribe I* that was directly in conflict with *Hagen—i.e.*, the portion that concerned whether lands that had been restored to the public domain remained within the Reservation. *Ute Indian Tribe II*, 114 F.3d at 1528-1531. The court thus did not disturb its earlier holding in *Ute Indian Tribe I* with respect to other lands, including those that had been allotted to tribal members and that had since passed into fee status. *Id.* at 1529-1530. The court explained that, "[b]ecause of the importance of finality," *id.* at 1520, only those portions of *Ute Indian Tribe I* that were not in direct conflict with *Hagen* would be modified, *id.* at 1527.

The procedural posture of *Ute Indian Tribe II* makes it unlike other diminishment or disestablishment cases, as the Tenth Circuit itself recognized. See 114 F.3d at 1515-1516. This case does not arise in a similar procedural posture. Nor does this case present the same finality concerns as did *Ute Indian Tribe II*, which involved an en banc decision that had been the law in the Tenth Circuit for a decade by the time of *Hagen*. In contrast, the boundaries of the Yankton Sioux Reservation have been constantly in litigation since the Tribe commenced this action in 1994.

3. Finally, the Tribe contends (Pet. 18-19), as does the State (Pet. 26-29), that the court of appeals' decision has implications for other reservations in the western United States. We do not expect that to be so. As explained above, the court's decision purports to be simply an application of well-settled principles of law to the particular circumstances of this case. Cases involving other reservations will neces-

sarily involve different statutes opening the reservation to settlement, different treaties or agreements between the United States and the Tribe, different historical circumstances, different subsequent settlement activity, and different treatment of the opened lands by the United States, the State, and the Tribe. See *Solem*, 465 U.S. at 469 ("It is settled law that some surplus land Acts diminished reservations and other surplus land Acts did not.") (citations omitted).

In any event, because the case was remanded to the district court for a determination of precisely which lands within the diminished Yankton Sioux Reservation are Indian country, the court of appeals' decision is interlocutory in nature. If the decision below proves, contrary to our expectations, to have the pernicious consequences that the Tribe or the State suggests, the Court will have a further opportunity to review that decision, together with any subsequent decision of the court of appeals after the proceedings on remand are completed.

CONCLUSION

The petitions for a writ of certiorari should be denied.[10]

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

JAMES C. KILBOURNE
Attorney

MAY 2000

---

[10] If the Court concludes, contrary to our submission, that review of the court of appeals' decision is warranted, we suggest that the Court grant both petitions, in order to ensure that it has before it the full range of issues going to both diminishment and disestablishment of the Reservation.

(5)

No. 99-1490

Supreme Court, U.S.
FILED
MAY 24 2000
CLERK

In The

Supreme Court of the United States

STATE OF SOUTH DAKOTA; WILLIAM JANKLOW, Governor of South Dakota; MARK W. BARNETT, Attorney General of South Dakota; SCOTT PODHRADSKY, State's Attorney of Charles Mix County; HERMAN PETERS, Member of the Charles Mix, South Dakota, County Commission; BRUCE BAKKEN, Member of the Charles Mix, South Dakota, County Commission; JACK SOULEK, Member of the Charles Mix, South Dakota, County Commission; SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Petitioners,

v.

YANKTON SIOUX TRIBE, and its individual members; UNITED STATES OF AMERICA, on its own behalf and for the benefit of the Yankton Sioux Tribe; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF STATE AND LOCAL GOVERNMENT PARTIES

MARK W. BARNETT
Attorney General
State of South Dakota

JOHN PATRICK GUHIN
Deputy Attorney General
Counsel of Record
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13PP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

A. THE STATE'S PETITION SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE COURT BELOW AND THE SOUTH DAKOTA SUPREME COURT AND FURTHERMORE TO RESOLVE THE CONFLICT OF THE COURT BELOW WITH *DECOTEAU* AND *YANKTON SIOUX TRIBE* 2

B. THIS CASE HAS IMPORTANT PRACTICAL AND JURISPRUDENTIAL IMPLICATIONS ... 6

C. THE ISSUE IS RIPE FOR REVIEW 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES CITED:

Bruguier v. Class, 599 N.W.2d 364 (S.D. 1999) . . 1, 2, 3, 4

DeCoteau v. District County Court, 420 U.S. 425 (1975) 1, 2, 3, 4, 5, 6

Hagen v. Utah, 510 U.S. 399 (1994) 2

Solem v. Bartlett, 465 U.S. 463 (1984) 6, 8

South Dakota v. Bourland, 508 U.S. 679 (1993) 7

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) 1, 3, 4, 5, 6

United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999), *cert. denied*, No. 99-1174 (May 15, 2000) 9

United States v. Stands, 105 F.3d 1565 (8th Cir. 1997), *cert. denied*, 522 U.S. 841 (1998) 9

Yankton Sioux Tribe v. Gaffey, 99 F.3d 1439 (8th Cir. 1996) 1

STATUTORY REFERENCES:

18 U.S.C. § 1151(a) 4, 8, 9

18 U.S.C. § 1151(c) 4, 8

25 U.S.C. § 467 9

OTHER AUTHORITY:

S. Misc. Doc. No. 134, 53d Cong., 2d Sess., 1 (1894) 6

INTRODUCTION

In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and later cases, this Court derived and relied upon clear guidelines for determining the status of reservations following the allotment and cession of reservation land in the late Nineteenth Century. The court of appeals in its first hearing of this matter essentially disregarded those guidelines, *see Yankton Sioux Tribe v. Gaffey*, 99 F.3d 1439 (8th Cir. 1996), but this Court, in overturning that decision, affirmed their vitality. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343-44 (1998).

Once again, however, on remand from this Court, the Eighth Circuit has ignored those guidelines and turned the disestablishment inquiry into an ad hoc effort, the results of which conflict with the South Dakota Supreme Court's rulings. The submissions of the United States and the Tribe only confirm how strongly review by this Court is warranted. The United States concedes that the Eighth Circuit "did not articulate its rationale" for its principal holding (U.S. Brief in Opp. 20) and advances wholly new justifications for that holding. Likewise, the Tribe crafts a theory for the Eighth Circuit's holding nowhere to be found in the decision below. Tribe Brief in Opp. 14. Simply put, the Eighth Circuit's decision is incoherent, is in conflict with *DeCoteau*, and is in conflict with the South Dakota Supreme Court's decision in *Bruguier v. Class*, 599 N.W.2d 364 (1999). App. 141. This Court should not let that result stand.

A. THE STATE'S PETITION SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE COURT BELOW AND THE SOUTH DAKOTA SUPREME COURT AND FURTHERMORE TO RESOLVE THE CONFLICT OF THE COURT BELOW WITH *DECOTEAU* AND *YANKTON SIOUX TRIBE*

1. The Decision Below Conflicts With the Decision of the South Dakota Supreme Court in *Bruguier v. Class*

The court below unabashedly refused to find the Yankton reservation to be terminated or disestablished. App. 47. In contrast, the South Dakota Supreme Court in *Bruguier v. Class*, App. 171, found "the Yankton Sioux Reservation [to be] effectively terminated by the 1894 Act." A conflict is clearly created. The United States and the Tribe, however, appear to assert that the *Bruguier* language was mere casual dictum. This is belied by *Bruguier* itself.

For example, *Bruguier*, App. 169, carefully analyzed this Court's opinion in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), which found the Lake Traverse reservation to be disestablished, and concluded that there was no "jural distinction" between the two cases. The South Dakota Supreme Court likewise noted that *DeCoteau* had found a congressional intent to "terminate" the reservation. App. 170. The South Dakota Court found "the same intent . . . in the Yankton Reservation sale." App. 170-71. *See also Bruguier*, App. 169, (to hold reservation "not terminated" would contradict "legal conception" of both Indians and non-Indians and defeat " 'justifiable expectations' " of people living in the area) (quoting *Hagen v. Utah*, 510 U.S. 399, 421 (1994)). There can be no real doubt that the South Dakota Supreme Court would reject, out of

hand, the suggestion that it had not determined the disestablishment question in a way contrary to the Eighth Circuit Court of Appeals.

The United States admitted as much just a few months ago. On February 25, 2000, the Solicitor General told this Court:

> The defendants sought rehearing to challenge the panel's holding that the Reservation was not *wholly disestablished*, a conclusion that had recently been reached by the South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (1999).

"Application for an Extension of Time Within Which to File a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit," *United States v. Matt Gaffey*, No. A-___, p. 5 n.1 (emphasis added). Thus, the Solicitor General conceded that the Supreme Court of South Dakota had found that the Yankton reservation was "wholly disestablished," *id.*, and that the decision conflicted with that of the court of appeals.

Similarly, the Tribe filed its own "Application for Extension of Time . . . " on March 3, 2000, in which it, like the United States, conceded that the Supreme Court of South Dakota had found the Yankton Reservation "wholly disestablished." *Id.* at 4 n.1. And, like the United States, it now argues a contrary position.

2. The Opinion of the Court Below Is in Conflict With *DeCoteau v. District County Court* Which *South Dakota v. Yankton Sioux Tribe* Held to Be Squarely On Point.

Yankton Sioux Tribe effectively held *DeCoteau v. District County Court* to be squarely on point. In particular, *Yankton Sioux Tribe*, 522 U.S. at 344 (quoting *DeCoteau*, 420 U.S. at 445), held that the " 'cession' and 'sum certain'

language" of Articles I and II of the Yankton Agreement "is 'precisely suited' to terminating reservation status." This Court continued:

> The terms of the 1894 [Yankton] Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau*.

Id. After *Yankton*, only the most weighty evidence should have been able to persuade a court that the Yankton reservation, like the Lake Traverse reservation, was not terminated.

But the court below, along with the United States[1] and Tribe, each ignore the holding of this Court that the language of the Yankton Agreement is " 'precisely suited' " to termination; each likewise ignores the disestablishment guidelines set out in *DeCoteau* and *Yankton Sioux Tribe*. As a result, the court below, App. 28-30, 32-43, the United States, U.S. Brief in Opp. 10-13, 19-22, and the Tribe, Tribe's Brief in Opp. 13-15, have each posited their own ad hoc approach to disestablishment, approaches

---

[1] The United States also spins a theory that the South Dakota Supreme Court believed that certain lands taken into trust were "Indian country" because they were "informal" reservations under 18 U.S.C. 1151(a). U.S. Brief in Opp. 16. Nothing in *Bruguier* supports this theory. Rather, *Bruguier* carefully defines and relies upon the 18 U.S.C. § 1151 subcategories, citing extensive authority of this Court, App. 153-55 n.13, with no indication that an "informal reservation" theory was being considered. The Court recognized, of course, that "Indian country" in the form of unextinguished allotments, *see* 18 U.S.C. § 1151(c), might still exist. *See Bruguier*, App. 153 (question is whether allotments are "part of a permanent reservation under 18 U.S.C. § 1151(a), *or* whether *only* those allotments still held in Indian hands are Indian country under 18 U.S.C. § 1151(c)" (emphasis added)).

which are not consistent, which will not lead to predictable results, and which surely defy the rulings of this Court.

This ad hoc approach is highlighted by the admission of the United States that the court below made but one "definitive ruling with respect to trust lands," i.e., that the former agency lands constitute a "reservation" but the court "*did not articulate its rationale for that determination.*" U.S. Brief in Opp. 20 (emphasis added).

Instead of following this Court's finding that *DeCoteau* controls this case, the court below and the parties have attempted to distinguish *DeCoteau*. This effort necessarily fails, for the reasons set forth above, and additionally on the merits. First, neither the Tribe nor the United States has made even a cursory attempt to overcome the eighteen points of identity between the Yankton and DeCoteau Agreement set out in State's Pet. at 16 n.6. Second, the characteristics claimed to distinguish the situations do not in fact do so.

For example, each argues that the Indians at Lake Traverse expressed a desire to terminate their reservation, but the Yankton Indians did not. This distinction cannot be sustained in light of the language of the Yankton Agreement, the best source of the parties' intentions, which this Court has found to be " 'precisely suited' " to "terminating" the reservation. Moreover, this Court found in *Yankton* that the report of the Commissioners "signaled their understanding that cession of the surplus land *dissolved tribal governance of the 1858 reservation.*" 522 U.S. at 353. (emphasis added). This Court in addition relied upon the language of a letter of three Yankton chiefs and more than a hundred members of the tribe to the effect that they wanted the laws of the " 'State we live in to be recognized and observed,' " a concept indicating

a clear desire to terminate the reservation. *Id. quoting* S. Misc. Doc. No. 134, 53d Cong., 2d Sess., 1 (1894).

Both the United States and the Tribe likewise attempt to find differences in the Yankton and Lake Traverse agreements other than in the critical "cession and sum certain" articles. As set out more fully in the State's Brief in Opp. in No. 99-1490, these articles in fact *strengthen* the case for disestablishment at Yankton, in that they tie the remaining federal interest to the 25-year allotment period. Thus, the United States' interest would remain only for that 25-year period – the period of the trust allotment – and not permanently, as in the case of "reservation."

B. THIS CASE HAS IMPORTANT PRACTICAL AND JURISPRUDENTIAL IMPLICATIONS

1. Reaffirmation of the Disestablishment Guidelines Set Out in This Court's Decisions Is Critical

Based on *DeCoteau* and prior decisions, this Court announced in *Solem v. Bartlett* that it had established a "fairly clean analytical structure" for analyzing surplus land acts. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). That structure was reemphasized in *Yankton Sioux Tribe*, 522 U.S. at 343-44. The approach focuses primarily, though not exclusively, on the " 'statutory language used to open the Indian lands,' " *id.* at 344, and has the virtue of providing predictability to those who live in areas which might be argued to be "reservations." The sea change in jurisdictional arrangements which follows the designation of an area as a "reservation" only emphasizes the importance of that predictability.

The decision of the court below, however, essentially jettisons the finely tuned rules of this Court and substitutes an ad hoc analysis which avoids the most critical language of the agreement, *see, e.g.*, App. 33, and is based instead on a largely subjective analysis of what the negotiators and the tribal members might have been thinking and of the perceived historical context. *See, e.g.*, App. 28-30, 32-43. It is, quite frankly, impossible to determine how a future court might apply the "rule" of the opinion below, and, indeed, the court of appeals could not state a rationale for the lands it did declare to be a "reservation." U.S. Brief in Opp. 20. The grant of certiorari is of great importance to the states of the Eighth Circuit to provide certainty in the determination of the prime dispute in Indian law – does a reservation exist or not?

2. This Case Is Important to the State of South Dakota

Tribal Petitioners ask this Court to ignore the important questions raised by this case because, they claim, the amount of land is "small" and is found in "remote, sparsely populated areas." Tribe Brief in Opp. 19. The State rejects that characterization. The former reservation is a part of southeastern South Dakota which bordered on the Missouri River, a vast source of recreation, fish and wildlife whose importance will broadly expand in the future. *See generally South Dakota v. Bourland*, 508 U.S. 679 (1993). The area is a prosperous, growing, and vital component of the state. Moreover, the 35,000 plus acres constitute a significant land area as to which there is an ongoing conflict between the state and federal courts, and which is important to the individual destinies of all those who live in or pass through the area.

3. The Practical Jurisdictional Consequences Are Important, Contrary to the Petitioners' Position

a. Jurisdictional Consequences With Regard to "Allotted Lands."

There is a major jurisdictional consequence with regard to *allotted lands*. Under the very language of 18 U.S.C. § 1151(c), "allotted" lands retain their "Indian country" status *only so long as* their "Indian title" has not been "extinguished." If the present-day "allotted lands" have "reservation" status under 18 U.S.C. § 1151(a), however, their "reservation" status is presumably *permanent* because, as this Court has held, land on a "reservation" does not lose its "Indian country" status by virtue of a transfer. *Solem v. Bartlett*, 465 U.S. at 470.

Ironically, this jurisdictional result would be at odds with the jurisdictional result which has already been declared by the court of appeals to exist in this case – i.e., allotted lands which have been transferred from tribal members to nonmembers have been declared by the Eighth Circuit to have lost their "reservation" and "Indian country" status. App. 47. The creation of a new hybrid of lands is thus a matter of great importance both within the former Yankton reservation and nationally.

b. Jurisdictional Consequences With Regard to Trust Lands

A significant jurisdictional consequence would follow from a final declaration that trust lands in the former reservation area acquired under the Indian Reorganization Act of 1934 or otherwise have "reservation" status under 18 U.S.C. § 1151(a). Just three years ago, the Eighth Circuit held that merely taking land into trust does not make such land "Indian country," let alone reservation.

See United States v. Stands, 105 F.3d 1565, 1571-1572 (8th Cir. 1997), *cert. denied*, 522 U.S. 841 (1998); *but see United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), *cert. denied*, No. 99-1174 (May 15, 2000). The IRA itself provides in section 7, codified at 25 U.S.C. § 467, a means by which the Secretary can create a "reservation" from lands taken into trust, but there is not a scintilla of a suggestion that this process has been followed here.

Thus, the decision under review has the potential to take mere trust lands within the former reservation and invest them with "reservation" status with the far-ranging jurisdictional consequences which attach to such status, based apparently on the subjective factors the court of appeals employed below.

C. THE ISSUE IS RIPE FOR REVIEW

The United States insists that this Court should postpone review of this case to a potentially later date. This plea should be rejected. First, the court of appeals has entered a final determination that a "reservation" exists in some form at Yankton.[2] Nothing on remand can eliminate the core dispute between the Eighth Circuit and the South Dakota Supreme Court over the essential disestablishment question. Second, nothing on remand can change the fact that the Eighth Circuit has disregarded this Court's precedents to set up a new "ad hoc" system of determining disestablishment questions.

---

[2] Review of this determination is especially critical because it directly conflicts with this Court's holding that the "ceded" lands lost "reservation" status at the time of the 1894 Act. *See* State Pet. 20-22. The State also rejects the argument at Tribe Brief in Opp. 19 that the district court rulings with regard to "agency" lands have *res judicata* effect. The ruling of the court of appeals clearly controls. Moreover, the description of the district court's ruling at *id.* is without foundation.

Third, the remand portion of the Eighth Circuit's opinion is frankly incoherent. As the United States acknowledges, the court of appeals gave no rationale for its determination that the "agency lands" constitutes a reservation. *See* U.S. Brief in Opp. 20. Moreover, there is nothing in the decision of the court of appeals that gives guidance to the district court to determine whether other lands may, or may not, be "reservation" beyond the vague, ad hoc, approach the court itself adopted. As a result, the parties can be assured of many more years of litigation and, presumably, a further hearing before the same panel of the court of appeals and a further application to this Court.

All the while, however, the conflict with the South Dakota Supreme Court will exist, and will possibly be exacerbated, and jurisdiction over the lands in question (some 35,000 plus acres) will be unknown.[3]

CONCLUSION

This Court should grant the State's Petition for Writ of Certiorari.

Respectfully submitted,

MARK W. BARNETT
Attorney General
State of South Dakota
JOHN PATRICK GUHIN
Deputy Attorney General
Counsel of Record
500 E. Capitol Avenue
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioners

---

[3] In the alternative to plenary consideration, guidance by way of summary disposition may be appropriate as to this Petition.